

ORIGINAL

Docketed

No. 9342

United States
Circuit Court of Appeals

For the Ninth Circuit.

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-
ration, and CLARK & WILSON LUMBER
COMPANY, a corporation,

Appellees.

Transcript of Record

In Three Volumes

VOLUME I

Pages 1 to 406

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

JAN 23 1940

NO. 9342

United States
Circuit Court of Appeals
For the Ninth Circuit.

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corporation, and CLARK & WILSON LUMBER
COMPANY, a corporation,

Appellees.


Transcript of Record

In Three Volumes

VOLUME I

Pages 1 to 406

Upon Appeal from the District Court of the United
States for the District of Oregon.



Digitized by the Internet Archive
in 2011 with funding from
Public.Resource.Org and Law.Gov

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answers of defendants to plaintiff's interrogatories	46
Answer to bill of complaint.....	14
Appeals	
Bond on	162
Designation, Appellees', of contents of record on (Circuit Court of Appeals).....	803
Designation, Appellant's amended, of contents of record on (District Court).....	165
Notice of	161
Order authorizing clerk to omit certain exhibits from the printed record.....	804b
Statement of points on.....	794
Stipulation as to record on.....	791
Stipulation that certain exhibits be omitted from the printed record.....	804a
Bill of particulars, Defendants'.....	35
Bond on appeal.....	162
Certificate of clerk to transcript of record.....	792
Complaint, Bill of.....	1

Index	Page
Decree, Final	160
Designation, Appellees', of contents of record on appeal (Circuit Court of Appeals).....	803
Designation, Appellant's amended, of contents of record on appeal (District Court).....	165
Exceptions of plaintiff to the Master's report and proposed findings and conclusion.....	88
Conclusion	124
Proposed findings	89
Interrogatories, Plaintiff's proposed.....	39
Master's report	54
Motion of defendants for bill of particulars.....	10
Motion of plaintiff for bill of particulars.....	28
Names and addresses of attorneys of record.....	1
Notice of appeal.....	161
Opinion	125
Order adopting Master's report and setting forth specific findings of fact and conclusion of law	143
Order allowing defendants to withdraw objec- tions	45
Order allowing plaintiff's motion for bill of particulars	34
Order allowing plaintiff to file interrogatories	37
Order authorizing clerk to omit certain exhibits from the printed record.....	804b

Index	Page		
Order of reference.....	52		
Order overruling exceptions and proposed findings	143		
Order to transmit original exhibits.....	177		
Response and compliance of plaintiff with defendants' motion for bill of particulars.....	11		
Statement of points on appeal.....	794		
Stipulation as to record on appeal.....	791		
Stipulation that certain exhibits be omitted from the printed record.....	804a		
Stipulation that further proceedings shall be pursuant to Federal Rules of Civil Procedure	125		
Stipulation to transmit original exhibits.....	167		
Stipulation withdrawing defendants' objections to interrogatories	44		
Testimony, Transcript of.....	178		
Excerpts from final argument of defendants	786		
Exhibits for complainant:			
	<table> <tr> <th style="text-align: center;">Introduced in Evidence Page</th> <th style="text-align: center;">Set out in Book of Exhibits Page</th> </tr> </table>	Introduced in Evidence Page	Set out in Book of Exhibits Page
Introduced in Evidence Page	Set out in Book of Exhibits Page		
1—Gerlinger's Patent No. 1,422,- 958, dated July 18, 1922, for Lumber Carrier	<table> <tr> <td style="text-align: right;">183</td> <td style="text-align: right;">805</td> </tr> </table>	183	805
183	805		

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for complainant (cont.):		
1-A—Ross patent No. 1,209,209, dated December 19, 1916, Motor Truck. (For copy of this pat- ent, see Defendants' Exhibit 78.)	183	1203
1-B—Ross Patent No. 1,271,947, dated July 9, 1918, on Portable Elevator	183	816
1-C—Overlin Patent No. 1,289,529, dated December 31, 1918, on Truck	183	826
1-D—Overlin Patent No. 1,349,292, dated August 10, 1920 on Lum- ber Truck	183	838
2—Gerlinger's Patent No. 1,457,- 025, dated May 29, 1923, on Lumber Carriers	190	848
3—Plaintiff's interrogatories	191	39
3-A—Answers to Plaintiff's inter- rogatories	191	46
4—File wrapper of Gerlinger Pat- ent No. 1,422,958.....	191	858
5—File wrapper of Patent in suit, 1,457,025	191	889

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for complainant (cont.):		
6—Drawing of Load-lifting means and control of same embodied in Plaintiff's lumber carriers, Nos. 2, 3, and 4.....	197	916a
7—Order of Shevlin-Hixon Co. of September 3, 1935.....	200	
8—Letter dated September 11, 1935 to Plaintiff from Shevlin- Hixon Co.	200	917
9—Pencil sketch of drawing sent to Gerlinger's Attorney at Washington from which to pre- pare drawings for the Patent in suit	205	
10—Pencil sketch of drawing sent to Gerlinger's Attorney at Washington from which to pre- pare drawings for the Patent in suit	205	
11—Pencil sketch of drawing sent to Gerlinger's Attorney at Washington from which to pre- pare drawings for the Patent in suit	205	
12—(Abstract of) Assignment of Patent in suit.....	207	918

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for complainant (cont.):		
13—Model of Gerlinger Lumber Carrier claimed to illustrate Patent in suit.....	216	
26—Enlargement of Sheet 1 of Drawings of Patent in suit.....	334	
27—Enlargement of Sheet 2 of Pat- ent in suit.....	334	
28—Omitted (Not sent on)		
29—Photographs of lumber carriers Nos. 2 and 3 built by Plaintiff	360	
30—Photograph of Plaintiff's ma- chine taken in 1922.....	360	
31—Photograph of Lifting mech- anism from which drawing Ex- hibit 6 was made.....	362	940
32—Service Manual of Defendant Willamette-Hyster Co.	409	
33—Enlargement of Drawing No. 1 on Page 4 of Manual.....	410	
34—Enlargement of Drawing No. 2 on Page 5 of Manual.....	410	940a
35—Photograph of Cottage Grove Machine built by Willamette- Hyster Co.	417	941

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for complainant (cont.):		
36—Photograph of Clutch Auto- matic Brake and Portions of Control included in Plaintiff's Exhibit 6 drawing.....	424	
37—Detailed sketch by witness Dimick in explaining drawings of Patent in suit.....	424	
46—3 sheets of record of sales of Plaintiff's mechanical lift car- riers known as RP.....	493	961
47—Grab Patent 1,838,939, Lifting Mechanism for Traversing Hoists dated December 29, 1931	511	965
48—Enlargement of Fig. 5 of draw- ing of Grab Patent.....	518	
49—(Abstract of) Assignment of Gustav A. Grab to Willamette Iron & Steel Works, August 31, 1927	520	974
50—(Abstract of) Assignment by Willamette Iron & Steel Works to Willamette-Ersted Co., March 29, 1929.....	520	974
51—File wrapper of Grab Patent 1,838,939 on December 29, 1931	520	974

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for complainant (cont.):		
71—Photograph showing arrange- ment of Lumber Piles in yard...	689	
72—Photograph showing arrange- ment of Lumber Piles in yard...	690	
73—Photograph showing mode in which straddle-type lumber car- riers pick up stacked lumber.....	690	
74—Photograph showing operation of straddle-type carrier for picking up lumber.....	691	1164
75—Photograph illustrating use of straddle-type carrier for pick- ing up pile of lumber arranged alongside sorting chain.....	691	
76—First inside sheet of folder put out by Willamette-Hyster Co. entitled "America's Finest Straddle Truck"	720	
Exhibits for Respondents:		
14—Gerlinger's Hydraulic Carrier, Patent 1,480,257, January 8, 1924	229	919
15—Page 65 "The Timberman" Oct. 1926	238	929

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for Respondents (cont.):		
16—Page 113 “The Timberman” November 1926	240	930
17—Pages 216 and 217 “The Timberman” November 1926.....	241	931
18—Page 207 “The Timberman” May 1926	242	933
19—Page 217 “The Timberman” June 1925	243	934
20—Page 147 “The Timberman” May 1924	250	935
21—Page 147 “The Timberman” December 1925	250	936
22—Page 170 “The Timberman” December 1925	251	937
23—Page 165 “The Timberman” December 1928	252	938
24—Page 117 “The Timberman” March 1929	253	939
25—Enlargement of drawings of Patent in suit.....	267	
38-A—Photograph of Defendants Clark & Wilson’s Co.’s 1923 Ross machine	430	942

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for Respondents (cont.):		
38-B—Photograph of Defendants Clark & Wilson's Co.'s 1923 Ross machine	430	943
38-C—Photograph of Defendants Clark & Wilson's Co.'s 1923 Ross machine	430	944
39—Withdrawn		
40—Withdrawn		
41—Circular of Willamette-Hyster Co.	439	945
42—Photograph of Willamette- Hyster Co. front end lift truck	440	948
43—Another photograph of the same truck with one wheel re- moved	440	949
44-A—Photograph of Plaintiff's lumber carrier as built by Plaintiff	578	950
44-B—Photograph of Plaintiff's lumber carrier as built by Plaintiff	578	951
44-C—Photograph of Plaintiff's lumber carrier as built by Plaintiff	578	952

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for Respondents (cont.):		
45—Sheets 1 to 9, inclusive, of record of Gerlinger Lumber Carrier known as RPF, manufactured by Plaintiff	483	953
52—Photo of mechanism contained in Willamette-Hyster lumber carrier	534	
53—Two pages from Record book kept by witness Hale.....	565	1008
54—Further Records from same book	565	1009
55—Photograph of No. 2 Ross Carrier stop mechanism used at Clark & Wilson	571	1010
56-A—Photograph of Clark & Wilson Co.'s No. 1 machine (of Willamette-Hyster)	573	1011
56-B—Photograph of Clark & Wilson Co.'s Willamette-Hyster machine No. 1.....	573	1012
57—A single Exhibit comprising:		
Dobson Patent No. 557,776.....	574	1014
Evans Patent No. 846,837.....		1018
Hatfield Patent No. 889,678.....		1032

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for Respondents (cont.):		
Brunelle Patent No. 1,054,900...		1036
Clark Patent No. 1,069,228.....		1042
Benton Patent No. 1,092,088.....		1054
Winkley Patent No. 1,163,799.....		1062
Hely Patent No. 1,186,188.....		1070
Clark Patent No. 1,200,411.....		1074
Ross Patent, No. 1,271,947 (Also Plaintiff's Exhibit 1-B)	183	816
Overlin Patent No. 1,289,529 (Also Plaintiff's Exhibit 1-C)	183	826
Overlin Patent No. 1,323,719.....		1080
Sproul Patent No. 1,326,984.....		1088
Carr Patent No. 1,407,124 (Also Defendants' Exhibit No. 69)	665	1152
Gerlinger Patent, No. 1,422,958 (Also Plaintiff's Exhibit 1)	183	805
58—Enlargement of photograph of Defendants' Exhibit 43.....	599	
59—Patent to Dingee, 414,380 No- vember 5, 1889, on Elevator.....	620	1104
60—Enlargement of drawings of said Dingee Patent	622	

Index

	Introduced in Evidence Page	Set out in Book of Exhibits Page
Exhibits for Respondents (cont.):		
61—Model of Dingee Patent.....	627	
62—Nicholson Patent No. 1,340,458	632	1114
63—Enlargement of drawings of said Nicholson Patent.....	634	
64—French & Pavey Patent No. 1,360,917	644	1122
65—Enlargement of drawing of French & Pavey Patent.....	645	
66—Towson & Cochran Patent No. 1,337,804	656	1130
67—Enlargement of drawings of said Towson & Cochran Patent	657	
68—Cochran Patent No. 1,260,145.....	662	1140
69—Carr Patent No. 1,407,124.....	665	1152
70—Enlargement of Figs. 1 and 8 of drawing of said Carr Patent	666	
77—Entire Folder put out by Wil- lamette-Hyster Company en- titled “America’s Finest Strad- dle-Truck”	755	
78—Ross Patent No. 1,209,209 (Also Plaintiff’s Exhibit 1-A).....	760	1203
79—Boudinot Patent No. 537,628.....	761	1212

Index	Page
Motion of defendants to strike.....	537
Order denying	537
Opening statement of defendants.....	537
Witnesses for defendants:	
Grab, Gustav A.	
—direct	575
—cross	683
—redirect	754
Hale, Claude M.	
—direct	560
Witnesses for plaintiff:	
Ballantyne, Walter E.	
—direct	392
—recalled, direct	402
—recalled, cross	480
—redirect	492
Dickson, John	
—direct	765
—cross	772

Index	Page
Witnesses for plaintiff (cont.):	
Dimick, Henry Noel	
—direct	330
—recalled, cross	448
—recalled, direct	504
Gerlinger, Carl F.	
—direct	181
—cross	207
—direct	211
—cross	220
—recalled, cross	424
Paul, William Howard	
—direct	779
Shepherd, Ronald	
—direct	506
—cross	521
Waters, John Landon	
—direct	407
—recalled, cross	493
—redirect	500

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

THEODORE J. GEISLER,

Platt Building,
Portland, Oregon,
for Appellant.

AUSTIN F. FLEGEL, JR.,

REYNOLDS, FLEGEL & SMITH,

American Bank Building,
Portland, Oregon,
for Appellees.

In the District Court of the United States
for the District of Oregon

July Term, 1935

Be It Remembered, That on the 3rd day of October, 1935, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit: [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Oregon

Equity No. 9581

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a Corporation,

(Plaintiff)

vs.

WILLAMETTE-HYSTER COMPANY, a Corpo-
ration, and CLARK & WILSON LUMBER
COMPANY, a Corporation,

(Defendants)

BILL OF COMPLAINT

The plaintiff respectfully shows and alleges:

I.

That the plaintiff is a corporation duly organized and existing under the laws of the State of Oregon, and has its principal place of business at Dallas, Oregon.

II.

That the defendant Willamette-Hyster Company during all the times of the wrongful acts herein complained of was and still is a corporation duly organized and existing under the laws of the State of Oregon, and is the same corporation as originally incorporated and existed under the corporate name Willamette-Ersted Company, having duly changed its name to Willamette-Hyster Company by supplementary articles; that the defendant has

its principal place of business in Portland within the District of Oregon.

III.

That the defendant Clark & Wilson Lumber Company is a corporation organized and existing under the laws of the State of Delaware, and is authorized to do business in this District of Oregon, and has a regular and established place of business at Linnton, Multnomah County, Oregon. [2]

IV.

This suit is brought for the infringement of letters patent of the United States, hereinafter specified, duly granted for an invention and to restrain the defendants and each of them, from further infringement of said letters patent, and to require the defendants and each of them, to account for the profits made by them respectively by said infringement, and also to recover the damages sustained by the plaintiff by reason of the infringements, all committed within the District of Oregon.

V.

That prior to March 30, 1922, Carl F. Gerlinger, then and still residing in Dallas, in the State of Oregon, was the original, first and sole inventor of a new and useful improvement in Lumber Carrier.

That said improvement in Lumber Carrier was not known or used by others before the invention thereof by said Carl F. Gerlinger, and that on March 30, 1922, the said Carl F. Gerlinger duly

filed an application for Letters Patent of the United States on said invention, such application being dated March 30, 1922, and bearing Serial No. 548,177. That at the time of the filing of said application for patent the said invention had not been patented or described in any printed publication in this or any foreign country before the invention of said improvement by the said Carl F. Gerlinger, or more than two years prior to his said application, and had not been patented in any country foreign to the United States on an application filed by said Carl F. Gerlinger or his legal representatives or assigns more than twelve months before his said application, and said improvement was not in public use or on sale in the United States for more than two years prior to his said application.

VI.

That thereupon, on due proceedings had by the said Carl [3] F. Gerlinger, and due compliance by him with all requirements of the Patent Statutes, on May 29, 1923, Letters Patent of the United States, bearing that date and No. 1,457,025, were duly granted to said Carl F. Gerlinger for said invention, whereby it is vested in him, his legal representatives and assigns for the term of seventeen years thereafter the exclusiv right to make, use and vend the said patented improvement in Lumber Carrier thruout the United States and the territories thereof. That the said Letters Patent at all times hereinafter mentioned, was and still is in full force

and effect. That a copy of said Letters Patent is attached hereto as Exhibit "A" of this Complaint, and the original Letters Patent is ready to be produced in Court in this cause.

VII.

That thereafter the entire right, title and interest in and to said Letters Patent were, for value received by the said Carl F. Gerlinger, duly sold, assigned and transferred unto the above named plaintiff, by an instrument in writing, dated the 2nd day of July, 1928; such transfer including an assignment of all damages accruing by the infringement of said Letters Patent, and the right to sue for and collect said damages; and the plaintiff is still the exclusive owner of said Letters Patent together with the rights to recover damages for the infringement thereof. And said assignment was duly recorded in the Transfers of Patents of the United States Patent Office on July 6, 1928, in Liber N135 at Page 43, and the original assignment is ready to be produced in Court.

VIII.

That since the granting to said Carl F. Gerlinger of said patent, he, and his said assignee, the Dallas Machine & Locomotive Works, Inc., engaged extensively in the making and selling of Lumber Carriers embodying said patented invention, and all such Lumber Carriers were duly marked with the notice required by law as [4] to the same being patented;

and the fact of said improvements being patented is well known to the trade in general, and the defendant Willamette-Hyster Company also had direct and actual knowledge of said Letters Patent. Furthermore, the said Carl F. Gerlinger and his said assignee, Dallas Machine & Locomotive Works, Inc., invested large sums of money in the manufacture and sale of lumber carriers embodying said patented improvement, and in advertising and introducing said patented improvement to the public, and to lumber mills in particular; and in consequence the patented improvements described by said Letters Patent have become widely and favorably known to the public, and persons engaged in operating lumber mills, and the said Carl F. Gerlinger and his said assignee, Dallas Machine & Locomotive Works, Inc. have sold a large number of lumber carriers embodying said improvement, and the public in general has acknowledged and acquiesced in the said exclusive rights granted by said Letters Patent; and the plaintiff would continue to make substantial profits under its said exclusive patent rights but for the infringement of said Letters Patent by the defendants, severally and jointly, hereinafter complained of. That the plaintiff is prepared to supply all demand for lumber carriers embodying said patented improvements.

IX.

That the defendants, and each of them, in violation of the exclusive rights of the plaintiff in and

under said Letters Patent, and within six years prior to the commencement of this suit, infringed said Letters Patent as follows:

That the defendant Willamette-Hyster Company, notwithstanding its knowledge of said Letters Patent, and in defiance thereof, did wilfully and deliberately manufacture lumber carriers embodying said patented improvements, and did sell the same to lumber mills and other users, including the defendant Clark & Wilson Lumber Company; and the defendant Clark & Wilson Lumber [5] Company, confederating with the defendant Willamette-Hyster Company, have used, and still continue to use, lumber carriers embodying said patented improvements which it obtained from the defendant Willamette-Hyster Company without the license of the plaintiff, and in violation of the plaintiff's exclusive rights under said Letters Patent. Whereby plaintiff has been, and still is, and will be, as long as said infringements continue, deprived of the just profits which it otherwise would make under said Letters Patent; and besides is greatly and irreparably damaged and injured in the premises by the defiance of plaintiff's said exclusive rights under said Letters Patent.

X.

That furthermore, the defendants and each of them, by their said infringement, have respectively made, and continue to make substantial profits, as plaintiff is informed and verily believes, which be-

long to the plaintiff, the amount of which profit plaintiff, however, cannot ascertain except by requiring the defendants to account under the order and direction of this Court.

XI.

That, furthermore, the defendants, by their said wrongful acts, are encouraging others to infringe upon said Letters Patent, and therefore plaintiff has been, and still is, and will be further irreparably damaged by the so induced infringement of said Letters Patent.

That in order to adequately protect the rights of plaintiff in the premises it is necessary that the defendants and each of them, their officers, employees, agents and confederates be enjoined pending this suit, and perpetually by the final decree of this Court, from the further infringement of said Letters Patent, and from aiding or abetting in any way such infringement.

Wherefore plaintiff prays for a decree:

1. Adjudging said Letters Patent to be valid, and that the entire right, title and interest thereof is vested in the [6] plaintiff.

2. That the defendants and each of them be adjudged to infringe upon said Letters Patent, and that each of the defendants be enjoined pending this suit, and perpetually by the final decree herein entered.

3. That a reference be had to a Master to take and report an account of the profits made by the

defendants respectively, and the damages and losses sustained by the plaintiff by reason of said infringement of said defendants; and that the plaintiff may have judgment for its losses and damages so found, together with such increase of its damages as by law provided, and as the Court may deem just; and that the plaintiff have the costs and disbursements of this suit, and such other and further relief as may be just.

DALLAS MACHINE & LOCO-
MOTIVE WORKS, INC.,

Plaintiff

By: CARL F. GERLINGER

President

THEODORE J. GEISLER

302 Platt Building

Portland, Oregon

Attorney for Plaintiff

[Verification]

Exhibit "A" to Bill of Complaint, being Exhibit "2" introduced at trial is here omitted.

[Endorsed]: Filed October 3, 1935. [7]

And Afterwards, to wit, on the 22nd day of November, 1935, there was duly Filed in said Court, a Motion for bill of particulars, in words and figures as follows, to wit: [8]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Now come Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, defendants above-named, and move the above-entitled Court for an order requiring plaintiff in the above-entitled cause to furnish the defendants with the following:

1. A statement of what claim or claims of Letters Patent No. 1,457,025 sued upon in the bill of complaint herein will be relied upon by the plaintiff at the trial of said cause and then be charged to have been infringed by defendants.

2. With respect to each of the claims to be relied upon by plaintiff at the trial a statement enumerating which, if any, of the elements of said claims plaintiff contends are found in defendants' device; and pointing out by reference characters applied to a drawing, photograph or cut of the device complained of where each of such elements is found in such device.

The ground for this motion is that the bill of complaint herein is vague, indefinite and uncertain in the particulars above specified, and that the defendants cannot intelligently prepare [9] for the trial of said cause unless said particulars are furnished.

Said motion will be based upon all of the papers and pleadings on file in said cause; upon Equity

Rule 20 and such evidence, oral or documentary, as may be adduced at the hearing of said motion.

CHAS. M. FRYER

ALFRED C. AURICH

AUSTIN F. FLEGEL, JR.,

Solicitors & Counsel for
Defendants.

[Endorsed]: Filed November 22, 1935. [10]

And Afterwards, to wit, on the 27th day of November, 1935, there was duly Filed in said Court, Plaintiff's response and compliance with Defendants' motion for bill of particulars, in words and figures as follows, to wit: [11]

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE AND COMPLI-
ANCE WITH DEFENDANTS' MOTION
FOR BILL OF PARTICULARS.

In response to the defendants' motion requiring the plaintiff to furnish defendants with certain particulars hereinafter set forth, plaintiff now furnishes these particulars as follows:

1. A statement of what claim or claims of Letters Patent No. 1,457,025 sued upon in the bill of complaint herein will be relied upon by the plaintiff at the trial of said cause and then be charged to have been infringed by defendants.

Plaintiff states that claim 4 of the patent in suit, No. 1,457,025, will be relied on.

As to Particular 2. With respect to each of the claims to be relied upon by plaintiff at the trial a statement enumerating which, if any, of the elements of said claims plaintiff contends are found in defendants' device; and pointing out by reference characters applied to a drawing, photograph or cut of the device complained of where each of such elements is found in such device.

Plaintiff states that the combination described and covered by said claim 4 of the plaintiff's patent is contained in the certain lumber carriers manufactured and sold by defendant Willamette-Hyster Company, a corporation, and used by defendant Clark & Wilson Lumber Company, a corporation, is illustrated and described by the printed "Service Manual" issued by defendant Willamette-Hyster Company, a corporation, to purchasers and users [12] of its said lumber carriers. Said manual being entitled:

“Service Manual
Complete Repair Parts List
Instructions for Maintenance and Operation
Assembly Drawings
Cut

Willamette
“Utility” Carriers
Type C
Willamette-Ersted Company
Factory and Main Office
Portland, Oregon, U. S. A.

Peoria, Illinois	New York, N. Y.
837 South Washington St.	126 Liberty St.”

(The corporate name of defendant Willamette-Hyster Company, a corporation, being formerly Willamette-Ersted Company, as set forth in the Complaint herein.)

That the said “Service Manual” at pages 1, 2 and 3 describes, and at pages 2 and 3 illustrates devices embodied in the lumber trucks manufactured and sold by the Willamette-Hyster Company which are the same in purpose and operation as those described by said claim 4 of plaintiff’s said patent, namely,

A lumber carrier comprising a frame, load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,

means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, [13] and means for braking the transmitting means whenever the clutch is moved to neutral position.

With this information plaintiff believes it has fully furnished defendants with the particulars they have required in order to enable them respectively to answer the Bill of Complaint herein.

Dated November 26, 1935.

THEODORE J. GEISLER

Attorney for Plaintiff.

[Endorsed]: Filed November 27, 1935. [14]

And Afterwards, to wit, on the 12th day of December, 1935, there was duly Filed in said Court, an Answer to bill of complaint, in words and figures as follows, to wit: [15]

[Title of District Court and Cause.]

ANSWER TO BILL OF COMPLAINT

Now come Willamette-Hyster Company, a corporation, and Clark and Wilson Lumber Company, a corporation, defendants above named and answering the bill of complaint on file in the above entitled cause, admit, deny and allege as follows:

I.

Answering Paragraph I of said bill of complaint, said defendants allege that they are without knowledge as to the allegations contained in said paragraph.

II.

Answering Paragraph II of said bill of complaint, said defendants deny that the defendant Willamette-Hyster Company, during all of the times mentioned in said bill of complaint, was a corporation duly organized and existing under the laws of the State of Oregon, but said defendants admit the remaining allegations contained in said paragraph.

III.

Answering Paragraph III of said bill of complaint, said defendants admit the allegations contained in said paragraph. [16]

IV.

Answering Paragraph IV of said bill of complaint, said defendants admit that this suit is brought for the alleged infringement of letters patent of the United States, specified in said bill of complaint, and to restrain the defendants and each of them, from further alleged infringement of said letters patent, and to require the defendants and each of them to account for the profits made by them respectively by said alleged infringement and also to recover the damages sustained by the plaintiff by reason of the alleged infringement, all alleged to be committed within the District of Oregon, but

said defendants deny that said letters patent were duly granted for an or any invention.

V.

Answering Paragraph V of said bill of complaint, said defendants deny that prior to March 30th, 1922, or at any other time or at all, Carl F. Gerlinger, was the original first, sole or any inventor of a new or useful or any improvement in Lumber Carrier.

Said defendants deny that said alleged improvement in Lumber Carrier was not known or used by others before the alleged invention thereof by said Carl F. Gerlinger, and deny that on March 30, 1922, the said Carl F. Gerlinger duly filed an application for letters patent of the United States on said alleged invention, such application being dated March 30, 1922, and bearing Serial No. 548,177.

Said defendants deny that at the time of the filing of said application for patent, the said alleged invention had not been patented or described in any printed publication in this or in any foreign country before the alleged invention of [17] said alleged improvement by said Carl F. Gerlinger, or more than two years prior to his said application; said defendants deny that said alleged invention had not been patented in any country foreign to the United States on an application filed by said Carl F. Gerlinger or his legal representatives or assigns more than twelve months before his said application, and said defendants deny that said alleged improvement was not in public use or on sale in the United

States for more than two years prior to his said application.

VI.

Answering Paragraph VI of said bill of complaint, said defendants deny that thereupon on due proceedings had by the said Carl F. Gerlinger or due or any compliance by him with all or any requirements of the Patent Statutes, on May 29, 1923, letters patent of the United States, bearing that date and No. 1,457,025, was duly granted to said Carl F. Gerlinger for the said alleged invention, whereby it is vested in him, his legal representatives and assigns for the term of seventeen years thereafter the exclusive right to make, use and vend the said alleged patented improvements in Lumber Carrier throughout the United States and territories thereof. Said defendants deny that said letters patent at all times thereafter mentioned, was or still is in full force and effect.

VII.

Answering Paragraph VII of said bill of complaint, said defendants allege that they are without knowledge as to the allegations contained in said paragraph.

VIII.

Answering Paragraph VIII of said bill of complaint, said defendants deny that since the granting to said Carl F. [18] Gerlinger of said patent, he, or his alleged assignee, the Dallas Machine & Locomotive Works, Inc., engaged extensively or at all in the making or selling of Lumber Carriers em-

bodying said alleged patented invention; deny that all or any such Lumber Carriers were duly or at all marked with the notice required by law as to the same being patented; deny that the fact of said alleged improvements being patented is well or at all known to the trade in general, and deny that the defendant Willamette-Hyster Company also had direct or actual or any knowledge of said letters Patent. Said defendants deny that said Carl F. Gerlinger or his alleged assignee, Dallas Machine & Locomotive Works, Inc., invested large or any sums of money in the manufacture or sale of Lumber Carriers embodying said alleged patented improvement or in advertising or introducing said alleged patented improvements to the public or the lumber mills in particular, or otherwise or at all; deny that in consequence the alleged patented improvements described by said letters patent have become widely or favorably or at all known to the public or persons engaged in operating lumber mills; deny that said Carl F. Gerlinger or his alleged assignee Dallas Machine & Locomotive Works, Inc. have sold large or any number of Lumber Carriers embodying said alleged improvement and deny that the public in general or at all has acknowledged or acquiesced in said alleged exclusive rights granted by said letters patent. Said defendants deny that the plaintiff would continue to make substantial or any profits under its said alleged exclusive patent rights but for the alleged infringement of said letters patent by the defendants, severally or jointly, complained

of in said bill of complaint, and said defendants deny that plaintiff is prepared to supply all or any demand for lumber carriers [19] embodying said alleged patented improvements.

IX.

Answering Paragraph IX of said bill of complaint, said defendants deny that they or each of them in violation of the alleged exclusive rights of the plaintiff in or under said letters patent or within six years prior to the commencement of this suit, or otherwise or at all have infringed said letters patent.

Said defendants deny that defendant Willamette-Hyster Company notwithstanding its alleged knowledge of said letters patent or in defiance thereof or otherwise or at all, wilfully or deliberately or at all manufactured lumber carriers embodying said alleged patented improvements, or sold the same to lumber mills or other users, including the defendant Clark & Wilson Lumber Company, or otherwise or at all; said defendants deny that the defendant Clark & Wilson Lumber Company, confederating with the defendant Willamette-Hyster Company, or otherwise or at all, have used or still continue to use lumber carriers embodying said alleged patented improvements which it obtained from the defendant Willamette-Hyster Company without the license of the plaintiff or in violation of said plaintiff's alleged exclusive rights under said letters patent, or otherwise or at all. Said defendants deny that thereby plaintiff has been or still is or will be, as

long as said alleged infringements continue, or at all, deprived of the just or any profits which it otherwise would make under said letters patent; and deny that plaintiff is greatly or irreparably or at all damaged or injured in the premises by the alleged defiance of plaintiff's said alleged exclusive rights under said letters patent, and in that regard said defendants allege that they have never infringed [20] said letters patent or any claim or claims thereof at any time or any place and have not threatened to infringe the same and do not intend to infringe the same.

Said defendants further allege that they have never at any time or at any place made, used or sold, or caused to be made, used or sold, any lumber carrier containing or embracing the alleged invention disclosed or claimed in said letters patent or any device containing any of the combinations of elements respectively set forth in any of the claims of said letters patent No. 1,457,025.

X.

Answering Paragraph X of said bill of complaint, said defendants deny that they or either of them by their said alleged infringement or otherwise or at all, have respectively made or continue to make substantial or any profit which belongs to plaintiff, the amount of which profit plaintiff cannot ascertain except by requiring the defendants to account under the order and direction of this Court, or otherwise or at all.

XI.

Answering Paragraph XI of said bill of complaint, said defendants deny that by their said alleged wrongful acts, they are encouraging others to infringe upon said letters patent, or therefore plaintiff has been, or still is, or will be further irreparably or at all damaged by the so alleged induced infringement of said letters patent.

Said defendants deny that in order to adequately or at all protect the rights of plaintiff in the premises it is necessary that the defendants or either of them, their officers, employees, agents or confederates be enjoined pending this suit, or perpetually by the final decree of this Court, from the [21] further alleged infringement of said letters patent, or from aiding or abetting in any way such alleged infringement.

XII.

For a further and separate defense, said defendants allege that by reason of the state of the prior art existing at the time of the said alleged invention by said Carl F. Gerlinger of the thing alleged to be described and patented in and by said letters patent No. 1,457,025, the said thing was not an invention and did not require the or any exercise of the inventive faculty for its production, and was not patentable, for which reason the said alleged letters patent No. 1,457,025 is null, void and of no effect.

XIII.

For a further and separate defense said defendants allege that the said Carl F. Gerlinger was not the original or first or sole or any inventor or discoverer of the alleged invention alleged to be patented in and by the said letters patent No. 1,457,025, or of any material or substantial part thereof, but long prior to the alleged invention thereof by the said Carl F. Gerlinger and more than two years prior to the filing of the application for said letters patent, the said alleged invention and every material and substantial part thereof, had been shown, described and patented in and by each of the following letters patent of the United States of America and foreign countries, and had been invented, known, publicly used and on sale and sold by each of the patentees, and at the places respectively named in each of said letters patent, and each of said patentees was the first and original inventor thereof, and at all times was using reasonable diligence in adapting and perfecting the same, and the respective places of residence of said patentees are respectively set forth in said letters patent, to-wit: [22]

Patentee	Number	Dates
Van Emon, et al	43,451	July 5, 1864
Herdman	507,617	Oct. 31, 1893
Bouck	722,444	March 10, 1903
Carr	1,407,124	Feb. 21, 1922

Amendment pursuant to stipulation filed March 6, 1936.

G. H. MARSH,
Clerk.

Patentee	Number	Date
Towson, et al	1,337,804	April 20, 1920
Cochrane	1,399,543	Dec. 6, 1921
Wright	1,404,419	Jan. 24, 1922
Hertner	1,505,889	Aug. 19, 1924

and other letters patent of the United States of America and foreign countries, the exact numbers, dates and names of the patentees of which are at present unknown to defendants, but which numbers, dates and names defendants reserve leave to insert in this Answer by amendment thereto, when ascertained.

XIV.

For a further and separate defense, said defendants allege that more than two years prior to the filing of the application for said letters patent No. 1,457,025, and prior to the alleged invention by said Carl F. Gerlinger of the alleged invention alleged to be claimed therein, said alleged invention had been in public use and had been on public sale and sold, and had been known and used by Ross Carrier Company at Benton Harbor, Michigan and by various other persons, firms and corporations at various and sundry places in the United States of America, the exact names and locations of which are at present unknown to the defendants, but which names and places defendants reserve leave

to insert in this Answer by amendment thereto when ascertained.

XV.

For a further and separate defense, said defendants allege that more than two years prior to the filing of the application for said letters patent No. 1,457,025, the alleged invention claimed therein had been disclosed, described and [23] set forth in various and sundry printed publications, the exact names of which are at present unknown to the defendants, but which names defendants reserve leave to insert in this Answer by amendment thereto when ascertained.

XVI.

For a further and separate defense, said defendants allege that said letters patent No. 1,457,025 is invalid and void for the reason that Carl F. Gerlinger, the alleged patentee thereof was not the original or first or any inventor thereof, in that the same and all material and substantial parts thereof were invented prior to the alleged invention by said patentee, by the following named persons, viz:

G. A. Grab, residing at Portland, Oregon,
H. B. Ross, residing at Benton Harbor, Michigan,
Henry Hartwig, residing at Sandy, Oregon,
who at all times were using reasonable diligence in adapting and perfecting the same.

XVII.

For a further and separate defense, said defendants allege that said letters patent No. 1,457,025 is

invalid and void for the reason that for the purpose of deceiving the public, the description and specification filed by said Carl F. Gerlinger in the Patent Office of the United States and embraced in his application upon which said letters patent was granted and issued, and the said application were made to contain less than the whole truth relative to his alleged invention or discovery, and therefore said letters patent No. 1,457,025 and each and all of the claims thereof, are void and invalid.

XVIII.

For a further and separate defense, said defendants [24] allege that during the prosecution of the application upon which said letters patent No. 1,457,025 was issued, the Patent Office rejected each and all of the broad claims thereof, and such rejection was acquiesced in by the said Carl F. Gerlinger, and such claims were cancelled and said letters patent was issued without embracing any but narrow claims, limited to the precise details disclosed and described in the specification of the said letters patent, for which reason plaintiff herein is estopped from contending and maintaining that the claims in said letters patent No. 1,457,025 are or that any of them is of a scope as broad as or broader than said rejected and cancelled claims or of a scope sufficiently broad to cover or include the machine complained of by plaintiff herein as infringing said letters patent No. 1,457,025.

XIX.

For a further and separate defense, said defendants allege that said invention sought and attempted to be described, patented and claimed in and by said letters patent No. 1,457,025 is of no utility whatever and that the same was never put into practical or any use, and cannot be practiced by anyone, and that said alleged invention is without utility, inoperative and worthless, for which reason said letters patent No. 1,457,025 and each and all of the claims thereof are null, void and of no effect.

XX.

For a further and separate defense defendants allege that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein, have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing [25] of this suit, and at all of such times plaintiff and its predecessors in interest have had full knowledge of the construction and operation of such Lumber Carriers and of said wide-spread manufacture, use and sale thereof, but neither plaintiff nor its predecessors in interest have at any time prior to the bringing of this suit asserted or attempted to enforce any alleged rights under the patent in suit with respect to any of such long-continued manufacture, use or sale of said Lumber Carriers; and throughout all of such time plaintiff and its predecessors in interest have continually

recognized and acquiesced in the right of defendants and of the public to make, use and sell such Lumber Carriers and have thereby encouraged the manufacture, use and sale of such Lumber Carriers, and the investment by defendants and others of large sums of money in making, using and selling such Lumber Carriers; and in reliance upon such conduct of plaintiff and its predecessors in interest defendants did so invest large sums of money for which reason plaintiff is guilty of laches with respect to the alleged cause of action attempted to be stated in the bill of complaint herein and is estopped to assert any of its alleged rights under the patent in suit against defendants, or either of them.

Wherefore, defendants pray that plaintiff take nothing by this suit, and that the bill of complaint herein be dismissed and that the defendants recover their costs herein incurred.

WILLAMETTE-HYSTER
COMPANY,

a corporation,

CLARK & WILSON LUMBER
COMPANY,

a corporation,

By CHAS. M. FRYER

Its Attorney

CHAS. M. FRYER

ALFRED C. AURICH

AUSTIN F. FLEGEL, JR.

Solicitors & Counsel for Defendant

[Endorsed]: Filed December 12, 1935 [26]

And Afterwards, to wit, on the 21st day of December 21, 1935, there was duly Filed in said Court, Plaintiff's Motion for bill of particulars, in words and figures as follows, to wit: [27]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR BILL OF
PARTICULARS

The plaintiff in the above entitled cause now moves the Court under Equity Rule 20 for an Order requiring the defendants, respectively, to furnish the plaintiff with the following further and better particulars of certain matters alleged in the defendants' Answer, viz:

1.

Referring to paragraph XII (page 7) of the Answer:

State what the prior art alleged in said paragraph consists of, whether

- (a) a publication;
- (b) a domestic or foreign patent;
- (c) or alleged prior knowledge and/or use, and in the latter case defendants further to state
- (d) when and where, and by whom, and in whose presence, such alleged prior knowledge or use occurred.

2.

Referring to paragraph XIII (page 7) of the Answer:

- (a) State the number, date and name of the particular foreign patent defendants intended to refer

to in this paragraph, in line 11, all the patents cited being United States patents;

(b) State which of the patents alleged in paragraph XIII (page 8) of the Answer will be offered in evidence by defendants on the trial of this case merely to illustrate the prior state of the art, and which thereof in support of defendants contention of the anticipation of the patent in suit. [28]

3.

With reference further to paragraph XIII (page 8, line 6) of the Answer:

State as nearly as defendants can at this time the numbers, dates or names of the patentees of other letters patents of the United States and/or foreign countries referred to by the defendants, but "the exact numbers, dates and names of the patentees of which are at present unknown to defendants".

4.

Referring to paragraph XIV (page 8) of the Answer:

State as nearly as defendants can at this time, the names and locations of the "various other persons, firms, and corporations at various and sundry places in the United States of America" by whom, for "more than two years prior to the filing of the application for said letters patent No. 1,457,025 * * * said alleged invention had been in public use and had been on public sale and sold", but "the

exact names or locations of which are at present unknown to the defendants”.

5.

Referring to paragraph XV, state as nearly as defendants can at this time the names of the “various and sundry printed publications” which “disclosed, described, and set forth” the invention covered by the patent in suit and “more than two years prior to the filing of the application for said patent”, but “the exact names of which (publications) are at present unknown to the defendants”.

6.

Referring to paragraph XVI, (page 9) of the Answer:

(a) State when each of the persons named in such paragraph invented the improvement in lumber carriers set forth in the Complaint in suit.

(b) State where such alleged invention occurred.

[29]

(c) State, with respect to each of said persons, whether the alleged prior invention covered the entire combination set forth by claim 4 of plaintiff's patent in suit, or only a particular part or element of said combination; and in the latter event, describe such particular part or element.

7.

Referring to paragraph XVII, (page 9) of the Answer:

(a) State what the alleged part of plaintiff's invention omitted from its said letters patent is.

(b) State whether the alleged omission was merely a detail of construction.

(c) State whether the alleged omission makes the improvement in Lumber Carriers described by plaintiff's patent inoperative.

8.

Referring to paragraph XX, (page 10) of the Answer and the allegation therein "that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein" (presumably designating the Lumber Carriers described by the patent in suit) "have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing of this suit":

(a) State specifically by whom, when, and where such alleged prior making and/or selling occurred;

(b) State specifically by whom, when, and where the prior use occurred.

9.

With further regard to paragraph XX of defendants' Answer, and particularly in reference to the allegation therein that during the said alleged prior making and selling of said lumber carriers the "plaintiff and its predecessors in interest have continually recognized and acquiesced in the right of the defendants and of the public to make, use and sell such lumber carriers": [30]

State specifically what the alleged recognition and/or acquiescence on the part of plaintiff and its predecessors in interest consisted of, that is,—

(a) Whether such alleged recognition and acquiescence will be predicated upon the failure of plaintiff, and/or its predecessors in interest, to take any action against said makers and users.

(b) Whether some act, and/or conduct of the plaintiff, and/or its predecessors, was relied on by defendants, or either thereof, and in such event state the particulars fully of such act and/or conduct.

Referring further to paragraph XX (page 11, lines 14 et seq. particularly) alleging that “in reliance upon such conduct of plaintiff and its predecessors in interest defendants did so invest large sums of money”, state for what purpose, and when, and where, the defendants, respectively, invested large sums of money in reliance upon any act or conduct by the plaintiff, or its predecessors in interest, in the premises.

* * * * *

That the reason for this Motion is that the joint Answers of the defendants with regard to the particular allegations thereof above referred to are so vague, indefinite and uncertain that the plaintiff is not informed of the true nature of the defendants' defense; and, therefore, cannot safely prepare for the trial of said cause unless the particulars hereinabove requested are furnished to plaintiff by defendants.

This Motion will be based upon the pleadings in the above entitled cause and such evidence, oral or documentary, as may be introduced at the hearing of this motion.

And plaintiff further moves that plaintiff's time in which to move for leave to file Interrogatories to be answered by an officer of the defendant corporations, respectively, under [31] Equity Rule 58, be extended by the order of this Court for Twenty (20) days after this Motion for Bill of Particulars is decided by the Court; and, if allowed, then for Twenty (20) days from the date on which the defendants furnish the plaintiff with such particulars as the Court may direct.

Dated December 20, 1935.

THEODORE J. GEISLER

Attorney for Plaintiff

To:

MESSRS. CHAS. M. FRYER,
ALFRED C. AURICH, and
AUSTIN F. FLEGEL, JR.

Solicitors & Counsel for Defendant

[Endorsed]: Filed December 21, 1935. [32]

And Afterwards, to wit, on Monday, the 2nd day of March, 1936, the same being the 1st Judicial day of the Regular March, 1936 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [33]

[Title of District Court and Cause.]

ORDER ALLOWING MOTION FOR
BILL OF PARTICULARS.

The plaintiff's motion for an order requiring the defendants to serve further and better particulars of certain matters alleged in defendants' Answer came on to be heard and was argued by counsel for the respective parties and thereupon, on consideration thereof, it is Ordered as follows:

That paragraphs 1, 2(a), 3, 4 and 5 be denied, and that paragraphs 2(b), 6, 7, 8 and 9 be and the same are hereby allowed.

Further Ordered that defendants serve on plaintiff and file with the Clerk of this Court a Bill of Particulars required by said paragraphs 2(b) 6, 7, 8 and 9 of said Motion for Bill of Particulars within 15 days from the date of the entry of this Order; and the plaintiff is hereby allowed 20 days after the service and filing of said Bill of Particulars in which to apply for an order allowing plaintiff to file interrogatories to be answered by officers of the defendant corporations.

Dated March 2, 1936.

JAMES ALGER FEE,

U. S. District Judge.

[Endorsed]: Filed March 2, 1936. [34]

And Afterwards, to wit, on the 24th day of March, 1936, there was duly filed in said Court, Defendants' bill of particulars, in words and figures as follows, to wit: [35]

[Title of District Court and Cause.]

DEFENDANTS' BILL OF PARTICULARS

Pursuant to the order of this Court dated March 2, 1936, Defendants file the following Bill of Particulars in response to Plaintiff's Motion for Bill of Particulars herein, dated December 20, 1935, the Particulars hereinafter set forth being in response to the correspondingly numbered paragraphs of Plaintiff's Motion:

2 (b) Each of the patents listed in Paragraph XIII of the original and amended Answer to the Bill of Complaint will be offered in evidence as an anticipation of the patent in suit and all thereof will be offered in evidence to show the state of the prior art.

6 (a) H. B. Ross in or about 1919.

6 (b) H. B. Ross in Benton Harbor, Michigan.

[36]

6 (c) The entire combination of Claim 4. Defendant will not rely at the trial upon prior invention by G.A. Grab or Henry Hartwig.

7 Paragraph XVII of the Answer to the Bill of Complaint is hereby cancelled and no evidence in support thereof will be offered at the trial. No further particulars as to such paragraph therefore are required.

8 (a) By Ross Carrier Co. in Benton Harbor, Michigan and Portland, Oregon, and elsewhere in the United States, ever since 1919. By Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, and elsewhere in the United States ever since 1924.

8 (b) By Ross Carrier Co. in Benton Harbor, Michigan and Portland, Oregon, and elsewhere in the United States, ever since 1919. By Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, and elsewhere in the United States ever since 1924.

9 (a) Yes.

9 (b) (First paragraph.) The failure of Plaintiff and its predecessors with full knowledge of the facts to assert any rights under the patent in suit against Defendants' carrier or others substantially identical therewith for more than six (6) years prior to suit.

9 (b) (Second paragraph.) Defendant, Willamette-Hyster Co. and its predecessors in interest in Portland, Oregon, ever since 1924, has expended large sums of money for plant equipment, materials, labor and development work in the manufacture and sale of the carriers alleged to infringe the patent in suit.

The defendant, Clark & Wilson Lumber Company in Portland, Oregon, ever since 1923, has expended large sums of [37] money for the purchase of carriers substantially identical with the carriers com-

plained of herein as infringements of the patent in suit.

Dated March 24, 1936.

WILLAMETTE-HYSTER
COMPANY,

a Corporation,

CLARK & WILSON

LUMBER COMPANY,

a Corporation,

By CHAS. M. FRYER,

Its Attorney.

CHAS. M. FRYER,

A. C. AURICH,

AUSTIN F. FLEGEL, JR.,

Solicitors & Counsel for Defendant.

[Endorsed]: Filed March 24, 1936. [38]

And afterwards, to wit, on Monday, the 13th day of April, 1936, the same being the 33rd Judicial day of the Regular March, 1936, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [39]

[Title of District Court and Cause.]

ORDER ALLOWING PLAINTIFF TO FILE
INTERROGATORIES.

The motion of plaintiff for leave to file interrogatories to be answered by officers of the defendant

corporations coming up for hearing, it is in accordance with the consent of the parties

Ordered that the plaintiff's proposed interrogatories may be filed, and that the defendants have the usual time from date, as provided by Equity Rule 58, in which to serve and file objections to said interrogatories, or certain thereof; and in the event that objections are filed, the answers to the interrogatories objected to shall be deferred until such objections have been heard and determined by the Court.

Dated April 13, 1936.

JAMES ALGER FEE

U. S. District Judge.

Agreed to.

T. J. GEISLER

Attorney for Plaintiff.

AUSTIN F. FLEGEL, JR.,

of Attorneys for Defendants.

[Endorsed]: Filed April 13, 1936. [40]

And Afterwards, to wit, on the 13th day of April, 1936, there was duly Filed in said Court, Plaintiff's Proposed interrogatories, in words and figures as follows, to wit: [41]

[Title of District Court and Cause.]

[Endorsed]: Complaint's Exhibit 3. R. F. Maguire, Master in Chancery.

PROPOSED INTERROGATORIES OF PLAINTIFF TO BE PROPOUNDED TO BOTH DEFENDANT CORPORATIONS, AND TO BE ANSWERED BY AN OFFICER THEREOF IN COMPLIANCE WITH RULE 58 OF THE EQUITY RULES.

Interrogatory No. 1.

Referring to the allegation in paragraph XVI of the defendants' answer, and to defendants' Bill of Particulars furnished in response to paragraph 6 (a), (b) and (c) of plaintiff's Motion therefor, to wit, that H. B. Ross in about 1919 in Benton Harbor, Michigan, invented a lumber carrier embodying the combination set forth by claim 4 of the patent in suit:

(a) The defendants are required to furnish plaintiff with a cut, or drawing, together with a full description thereof, showing the construction of the lumber carrier referred to by defendants, and particularly of that part thereof embodying the invention described by claim 4 of plaintiff's patent; or that defendants state the particular place where one of these alleged carriers, as built in 1919, is now located and accessible to plaintiff for inspection thereof; also the name of the party in whose custody said carrier now is. [42]

(b) State whether the said lumber carrier alleged by defendants to have been invented by said H. B. Ross in Benton Harbor, Michigan, in 1919, embodied specifically all of the following elements:

A lumber carrier comprising a frame,
load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,

means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction,

and means for braking the transmitting means whenever the clutch is moved to neutral position.

(c) If said lumber carrier did not embody all of said elements, state which of said elements it did not embody.

Interrogatory No. 2.

Referring to the allegation in defendants' Answer, paragraph XX, and defendants' Bill of Particulars furnished in response to paragraph 8 (a) and (b) of plaintiff's Motion therefor, to wit, that lumber carriers embodying claim 4 of the patent in suit were made, and sold, and used by Ross Carrier Co. in Portland, Oregon, ever since 1919:

(a) State the name and location of the party or parties to whom one of these lumber carriers was

sold by said Ross Carrier Co. in Portland, Oregon, in 1919.

(b) State the manner and particulars of the use, in 1919, in Portland, Oregon, of one of these lumber carriers, that is, whether such use was merely a demonstrating use, or was an actual use of the lumber carrier by some other party who was at the time in Portland, Oregon; and in the latter case the name and present address of the party who actually used such lumber carrier. [43]

Interrogatory No. 3.

Referring further to the allegations in paragraph XX of defendants' answer and defendants' Bill of Particulars furnished in response to paragraph 8 (a) of plaintiff's Motion therefor, to wit, that ever since 1924 in Portland, Oregon, as well as elsewhere, defendant Willamette-Hyster Company made and sold lumber carriers embodying the combination described by claim 4 of the patent in suit:—

(a) State whether defendant Willamette-Hyster Company published and/or distributed to purchasers, or prospective purchasers of lumber carriers, any circular, or pamphlet descriptive of the lumber carriers which the defendant Willamette-Hyster Company manufactured and/or sold since 1924, and showing the embodiment of the combination described by claim 4 of the patent in suit; also the respective dates of such publication.

(b) If defendant answer the preceding interrogatory that it did publish such circular or pam-

phlet, then defendant is required to furnish plaintiff with a copy of such circulars or pamphlets, designated, respectively, by the dates of publication thereof; and if either of such circulars, or pamphlets, is at present no longer in print, defendant Willamette-Hyster Company is required to furnish plaintiff with a photograph copy of the particular pages and cuts of such circular or pamphlet no longer in print, but which describes the lumber carrier on which defendant Willamette-Hyster Company will rely as showing the combination described by claim 4 of the patent in suit.

(c) Defendant Willamette-Hyster Company is further required to furnish plaintiff with a copy of any circular, or pamphlet which it at present distributes to purchasers or prospective purchasers of the lumber carriers and embodying a feature similar to that described by claim 4 of the patent in suit. [44]

Interrogatory No. 4.

State whether the lumber carrier which defendant Willamette-Hyster Company is at present manufacturing and/or selling embodies the following elements in combination, viz.:

A lumber carrier comprising a frame,
load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,

means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction,

and means for braking the transmitting means whenever the clutch is moved to neutral position.

Interrogatory No. 5

(a) State whether the defendant Willamette-Hyster Company or anyone in its behalf, had any correspondence, or conversation, with the plaintiff, or any person connected with the plaintiff, since 1924, about a lumber carrier embodying the combination described by claim 4 of the patent in suit.

(b) If defendant Willamette-Hyster Company answer that it had such correspondence, the defendant Willamette-Hyster Company is required to furnish plaintiff with a copy of such correspondence.

(c) If defendant Willamette-Hyster Company answer that it had no such correspondence, but did have such conversation, that defendant state when, with whom, and where such conversation was had.

(d) State whether in said conversation the defendant Willamette-Hyster Company informed the plaintiff that the Willamette-Hyster Company intended to manufacture and sell lumber carriers embodying the combination described by claim 4 of the patent in suit. [45]

Interrogatory No. 6.

State the date approximately when defendant Willamette-Hyster Company first learned of, or had any information of the plaintiff's patent in suit, and how and from whom it received such information.

The defendant Clark & Wilson Lumber Company is required to answer specifically the following interrogatory.

Interrogatory No. 7.

State approximately the date when the defendant Clark & Wilson Lumber Company first learned of, or had any information of the patent in suit, and how, and from whom it received such information.

Dated April 2, 1936.

THEODORE J. GEISLER

Attorney for Plaintiff

[Endorsed]: Filed April 13, 1936. [46]

And afterwards, to wit, on the 6th day of July, 1936, there was duly filed in said Court, a

STIPULATION WITHDRAWING DEFENDANTS' OBJECTIONS TO INTERROGATORIES,

in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

It is hereby stipulated between the parties that the defendants' objections to plaintiff's Interroga-

tories shall be and hereby are withdrawn, and that defendants shall answer each of said interrogatories separately and fully not later than July 16, 1936.

Dated July 6, 1936.

(Signed) REYNOLDS, FLEGEL & SMITH

Of Attorneys for Defendants

(Signed) T. J. GEISLER

Attorney for Plaintiff

So ordered.

U. S. District Judge

[Endorsed]: Filed July 6, 1936. [48]

And afterwards, to wit, on Monday, the 6th day of July, 1936, the same being the 1st Judicial day of the Regular July, 1936 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [49]

ORDER

Now at this day on motion of Mr. John W. Reynolds, of counsel for the defendants in the above entitled cause, and upon the stipulation of the parties filed herein,

It is ordered that the defendants be and they are hereby permitted to withdraw their objections to plaintiff's interrogatories and that said defendants shall answer each of said interrogatories separately and fully not later than July 16, 1936.

Dated July 6, 1936.

JAMES ALGER FEE

Judge

[Endorsed]: Filed July 6, 1936. [50]

And afterwards, to wit, on the 15th day of July, 1936, there was duly filed in said Court, Defendants' Answers to Plaintiff's Interrogatories, in words and figures as follows, to wit: [51]

[Title of District Court and Cause.]

[Endorsed]: Complainant's Exhibit 3a. R. F. Maguire, Master in Chancery.

DEFENDANTS' ANSWERS TO PLAINTIFF'S
INTERROGATORIES

In answer to plaintiff's Interrogatories 1 to 6, inclusive, on file herein, defendant Willamette-Hyster Company alleges as follows:

Answer to Interrogatory No. 1

(a) According to defendant's present information and belief the lumber carrier inquired about was invented in 1921 rather than 1919 as stated in Interrogatory No. 1. Defendant is informed and believes that one of such lumber carriers is in the possession of and can be seen at Goodyear Yellowpine Company, at Picayune, Mississippi, and that another thereof is in the possession of and can be seen at Inman-Poulson Company of Portland, Oregon.

(b) Yes, according to defendant's information and belief.

(c) No answer required.

Answer to Interrogatory No. 2

The allegation in plaintiff's Interrogatory No. 2 to the effect that Paragraph XX of defendants' answer and Paragraphs [52] 8-a and 8-b of defendants' bill of particulars allege that lumber carriers embodying claim 4 of the patent in suit were made and sold and used by Ross Carrier Company in Portland, Oregon, ever since 1919 is incorrect as none of the allegations in such paragraphs of defendants' pleadings alleges that Ross Carrier Company made or sold a lumber carrier embodying the combination of claim 4 of the patent in suit. If Interrogatory No. 2 is directed to the actual allegations in Paragraph XX of defendants' answer and Paragraphs 8-a and 8-b of defendants' bill of particulars, then the answer to Interrogatory No. 2 is as follows:

(a) Defendant is informed and believes that a carrier substantially identical in construction and operation with defendants' carrier was sold by Ross Carrier Company to Inman-Poulson Lumber Company at Portland, Oregon, in 1922.

(b) The Ross carrier sold to Inman-Poulson Company as referred to in Paragraph (a) above, according to defendant's information and belief has been in use by that company in its commercial operations in Portland, Oregon since 1922 until the present time.

Answer to Interrogatory No. 3

The allegation in plaintiff's Interrogatory No. 3 to the effect that Paragraph XX of defendants' answer and Paragraph 8-a of defendants' bill of particulars allege that ever since 1924 in Portland, Oregon, and elsewhere, defendant Willamette-Hyster Company made and sold lumber carriers "embodying the combination described by claim 4" of the patent in suit, is incorrect, as neither Paragraph XX of defendants' answer nor Paragraph 8-a of defendants' bill of particulars alleges that defendant Willamette-Hyster Company made or sold a lumber carrier [53] embodying the combination of claim 4 of the patent in suit. If Interrogatory No. 3 relates to the actual allegations in Paragraph XX of defendants' answer and the actual allegations in Paragraph 8-a of defendants' bill of particulars, the answer to Interrogatory No. 3 is as follows: '

(a) No.

(b) No answer required.

(c) Defendant Willamette-Hyster Company does not at present distribute to its purchasers or prospective purchasers any circular or pamphlet of lumber carriers embodying the features described in claim 4 of the patent in suit. However, a circular or pamphlet substantially the same as defendant Willamette-Hyster at present distributes to its purchasers or prospective purchasers is the one set forth and described in Paragraph 1 of plaintiff's bill of particulars on file herein, dated November 26, 1935, such circular being referred to therein as

“Service Manual Complete with Spare Parts List, Instructions for Maintenance and Operation.”

Answer to Interrogatory No. 4

The industrial truck or carrier that defendant Willamette-Hyster Company is at present manufacturing and selling comprises a frame, screw lifts supported by such frame for raising and lowering any desired load, a motor to supply power for operating the screw lifts, a power controlling device to transmit and control power from the motor to such screw lifts, a handle for manually operating such power controlling device to drive the screw lifts in either of two directions or to bring the power controlling device to neutral position so that no power from the motor is transmitted to the screw lifts, an automatic spring operated brake to hold the screw lifts and [54] connected mechanism against movement whenever the power controlling device is placed in neutral and limit stops cooperating with screw lifts and operable automatically and independently of any load carried by the truck to bring the power controlling device to neutral whenever the screw lifts reach predetermined upper and lower limits.

Answer to Interrogatory No. 5

- (a) No.
- (b) No answer required.
- (c) No answer required.
- (d) No answer required.

Answer to Interrogatory No. 6

Defendant Willamette-Hyster Company first learned of the patent in suit through Mr. G. A. Grab, who has been in charge of its industrial truck or carrier business ever since its inception, and Mr. G. A. Grab has known of the patent in suit ever since the date of its issuance.

WILLAMETTE-HYSTER COMPANY

By G. A. GRAB

State of Oregon,

County of Multnomah—ss.

G. A. Grab, being first duly sworn, deposes and says: I am the G. A. Grab mentioned in and who signed the foregoing Answers to Interrogatories. I have read such Answers and the Interrogatories to which they are a reply and know the contents thereof. The facts alleged in such Answers are true of my own knowledge except as to the matters therein alleged on information or belief, and as to those matters I believe them to be true.

G. A. GRAB [55]

Subscribed and sworn to before me this 15th day of July, 1936.

[Seal]

A. F. FLEGEL, JR.

Notary Public for the County of Multnomah,
State of Oregon.

My Commission expires June 17, 1939.

In answer to plaintiff's Interrogatory No. 7 on file herein, defendant Clark and Wilson Lumber Company alleges as follows:

Answer to Interrogatory No. 7

In or about October, 1935.

CLARK AND WILSON LUMBER
COMPANY

By C. G. KINNEY

State of Oregon,
County of Multnomah—ss.

C. G. Kinney, being first duly sworn, deposes and says: I am the Vice Pres. and Genl. Mgr. of Clark and Wilson Lumber Company and as such signed the foregoing answer to plaintiff's Interrogatory No. 7. I have read such answer and the interrogatory to which it is a reply and know the contents of such answer and the same are true of my own knowledge.

C. G. KINNEY

Subscribed and sworn to before me this 15 day
of July, 1936.

[Seal] H. M. KRELS

Notary Public for the County of Multnomah,
State of Oregon.

My Commission expires Oct. 24, 1938.

[Endorsed]: Filed July 15, 1936. [56]

And Afterwards, to wit, on Thursday, the 12th day of November, 1936, the same being the 9th judicial day of the Regular November, 1936 term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [57]

ORDER OF REFERENCE

This cause having been regularly set on the calendar of this court for final hearing on the 16th day of November, 1936, and on the 12th day of November, 1936, plaintiff appearing by Mr. T. J. Geisler, of counsel, and the defendants having appeared by Mr. Austin F. Flegel, of counsel, and it appearing that the trial calendar of this court is congested by reason of a vacancy in the office of United States District Judge for this District and that there are a number of causes awaiting trial by jury, including a number of criminal causes which are entitled to preference over civil matters as to the trial thereof, and it appearing that this condition will continue unless many of the causes now pending, including this cause, can be disposed of in the manner herein provided, and hence that in order to fairly and within a reasonable time dispose of the business before the court, it is necessary that this order be made, and the court deeming it expedient and necessary for the purpose of justice that this cause be referred to the Standing Master in Chan-

cery to hear the parties to this cause and make a report herein,

It Is Ordered that this cause be and it is hereby referred to Mr. Robert F. Maguie, Esquire, Standing Master in Chancery, who will in an advisory capacity and in accordance with the equity rules and **the rules of this court**, take testimony herein and have the same transcribed, receive evidence, make findings of fact and draw conclusions of law, on all issues disclosed by the pleadings referred herewith, and recommend to the court a decree to be entered thereon, all to be delivered to, received in, and finally passed upon by this court.

Said Master is authorized and empowered to do all things, and to make such orders as may be required to accomplish a full hearing on all issues of fact and of law in this cause, and the exceptions of the parties to the rulings, findings, conclusions and recommendations, of said Master are reserved, and the costs of this proceeding shall abide the event.

Dated at Portland, Oregon, this 12th day of November, 1936.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed November 12, 1936. [58]

And Afterwards, to wit, on the 1st day of July, 1937, there was duly filed in said Court, a Master's Report, in words and figures as follows, to wit: [59]

[Title of District Court and Cause.]

MASTER'S REPORT.

To the Honorable James Alger Fee, Judge of the
Above Entitled Court:

On the 12th day of November, 1936, the above entitled suit was referred to the undersigned as Master in Chancery to take testimony, make findings of fact and conclusions of law and recommendation to Your Honor upon the issues of fact and law involved, and the relief, if any, to be granted in the above entitled suit.

Pursuant thereto, the parties appeared before the Master, the plaintiff appearing by T. J. Geisler, Esq., its solicitor, and the defendant appearing by Mr. Austin F. Flegel, Mr. Charles M. Fryer and Mr. Alfred C. Aurich, of [60] its solicitors. The parties submitted testimony in support of the issues and thereafter submitted the matter to the Master upon oral argument and written briefs.

The Master begs to submit his report on the proceedings as follows:

Statement of the Case.

The plaintiff is assignee of United States Letters Patent No. 1457025, issued May 29, 1923, to Carl F. Gerlinger, and was such assignee at all times involved in this suit.

Plaintiff alleges that the defendant Willamette-Hyster Company, with knowledge of the letters patent, has wilfully and deliberately manufactured lumber carriers embodying the patented improvements, has sold the same to lumber mills and others, including the defendant Clark & Wilson Lumber Company, and that the latter has used and continues to use lumber carriers embodying the patented improvements without license from plaintiff and in violation of its rights. It is alleged that the defendants and each of them, by said infringement, have respectively made and continue to make substantial profits which belong to plaintiff, for which it seeks an accounting. It prays for a decree (1) adjudging the letters patent to be valid [61] and the entire rights therein vested in the plaintiff; (2) that each of the defendants be adjudged to infringe the patent in suit and that they be temporarily and, upon final decree perpetually, enjoined from infringement; and (3) that an accounting be had of the profits made by the defendants and the damages and losses sustained by plaintiff by reason of the infringement in question.

The defendants, answering jointly, deny the validity of the patent, deny that Gerlinger was the first and original inventor of the device described in the patent, and deny infringement. They then set up the following further and separate defenses:

1. Lack of infringement, in view of the state of the prior art;

2. That the patentee was not the first, sole, or any inventor or discoverer of the alleged invention, or any material or substantial part thereof, but that for more than two years prior to the filing of the application for patent the alleged invention had been shown, described and patented in the following letters patent of the United States and foreign countries, and publicly used and on sale and sold by each of the patentees, and that said patentees were in fact the first and original inventors thereof and were using reasonable diligence in adapting and perfecting [62] the same.

Name.	Number.	Date.
Van Emon	43451	July 5, 1864
Herdman	507617	Oct. 31, 1893
Bouch	722444	Mar. 10, 1903
Carr	1407124	Feb. 21, 1922

And by amendment cite,—

Towson	1337804	Apr. 20, 1920
Cochrane	1399543	Dec. 6, 1921
Wright	1404419	Jan. 24, 1922
Hertner	1505889	Aug. 19, 1924

3. That for more than two years prior to the filing of the application for the patent in suit there was in public use and on public sale a carrier embodying the alleged invention known as the Ross Carrier, and that other devices likewise embodying the alleged invention were used and sold by other named persons;

4. That more than two years prior to the filing of the application the alleged invention had been disclosed in various printed publications;

5. That the patent is invalid because Gerlinger was not the original, first, or any inventor thereof, but the actual inventors were G. A. Grab, H. B. Ross and Henry Hartwig;

6. That the patent is invalid because Gerlinger, for the purpose of deceiving the public, did not include in his application the whole truth of the alleged invention. (This, however, defendants subsequently abandoned). [63]

7. That by reason of the action of the Patent Office in rejecting each and all of the broad claims of the application, which rejection was acquiesced in by the applicant, the letters patent were issued without embracing any but narrow claims limited to the precise details disclosed in the specifications, and therefore plaintiff is estopped from contending that the claims of the patent are as broad, or broader, than the rejected and cancelled claims, or sufficiently broad to cover the alleged infringing machine;

8. That the invention sought to be patented is without utility and was never put into actual practical or any use; that it cannot be patented by any one, and that it is inoperative and worthless;

9. That plaintiff is guilty of laches and is estopped to assert any rights against the defendants,—for that lumber carriers substantially identical in construction and operation with the lumber

carriers complained of have been made, sold and widely used for more than six years prior to the beginning of this suit (of all of which plaintiff had full knowledge); but neither it nor its predecessor, prior to the institution of this suit, asserted or attempted to enforce any alleged rights to the patent with respect to such long, continuous manufacture, use and [64] sale, and have continually recognized and acquiesced in defendants' rights and those of the public to manufacture, sell and use such lumber carriers, and that defendants have invested large sums of money in making, using and selling such lumber carriers, relying upon plaintiff's acquiescence.

The Patent

By its bill of particulars, plaintiff relies upon the alleged infringement of Claim 4 of the patent.

Claim 4 is as follows:

A lumber carrier, comprising

1. A frame;
2. Load-lifting means mounted THEREIN;
3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction;
4. Means for manually moving the clutch to operative position;
5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in EITHER direction;

6. Means for braking the transmitting means whenever the clutch is moved to a neutral position.

It may serve, in properly analyzing this patent, to state what was the previous state of the art and [65] what the patentee claims to have invented. The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load WITHIN and not UPON or in FRONT of its frame, and enabling the load to be picked up, transported and deposited as desired. None of these things were new in the art when the patentee applied for his patent.

These carriers, used originally and principally for the purpose of picking up and transporting piles of lumber, in the earlier stages of development utilized a cable or chain lift. Defects were discovered, in that the cable did not give a positive and uniform lift. The next method of lifting means adopted was rackbars and pinions driven from the power plant of the machine. Gerlinger claims to have been the originator of this kind of a hoist as adapted to a straddle type lumber carrier. In use it was found that, while the lift was positive and uniform, considerable care was required on the part of the operator manually to disconnect the power from the lifting mechanism when the load had reached the proper height, and that in the course of travel vibration of the machine and other factors tended to cause the mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground. [66]

The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator.

This Gerlinger accomplished. The means disclosed by his patent and his drawings are as follows:

1. To limit upward movement and procure automatic means for moving the clutch to neutral (thus disconnecting the source of power from the hoisting mechanism) and simultaneously applying the brake, he proposed a bar (No. 67, figure 3 of the patent drawing) moving on a pivot which would be engaged by the top of the load as it was hoisted, with suitable linkage which pushed the clutch into neutral and applied the brake. This linkage and this brake are Nos. 48, 69, 74, and 76 of the patent drawing. [67]

2. On downward movement of the hoist, to procure like automatic disconnection of the clutch and application of the brake, he proposed an adjustable set screw (No. 65) attached to the upper end of the right hand rear rackbar, which, as the load was lowered, engaged one arm of a bell crank lever, (No.

66), the other end of which lever engaged the rear end of clutch lever No. 64 and in the movement threw the clutch into neutral and simultaneously actuated linkage, 74, which in turn, by means of a cam at its outer end, raised a brake, 76, engaging the shaft, 46, which drives the gears of the lifting mechanism.

The question is,—does this constitute invention and, second, does defendant's device infringe upon it?

The prior art clearly discloses the use of like means and hoists and elevators, some of them stationary, some of them mounted on wheels and, of the latter, some with and some without motive power for self-propulsion. It is to be observed that the early art does not disclose self-propelled hoists or carriers in which the load is carried **WITHIN** the frame and **BETWEEN** the wheels, but clearly discloses stops of various kinds, which at a given stage of hoist movement, up or down, [68] throw the clutch into neutral, thus disconnecting the lifting power and applying a brake. The means adapted differ no more from those of Gerlinger than do the means applied by him differ from the means employed by the defendant.

The stops in defendant's infringing device are not placed on the rackbar, and in fact the device does not use a rackbar. Nor is the stop which limits the upward movement of the hoist **ACTUATED BY THE LOAD**. Defendant's means for disconnecting the clutch and applying the brake is shown

in Exhibits 34, 52 and 56b. As is seen in Exhibit 52, power is transmitted by means of a clutch to a chain and sprocket, (shown in yellow), which is fixed at the end of a threaded shaft, which in turn carries a traveling nut (colored in purple). Attached to this nut are suitable levers, which, as the nut is moved along the revolving threaded shaft, change their position, thus lifting or lowering the hoist, depending upon the direction in which the nut moves along the yellow shaft.

Referring now to Exhibit 52, which delineates in detail the clutch shifting and braking [69] mechanism, it will be seen that as the nut moves along the shaft it engages stops fixed on a moveable shaft (all colored in red). This action throws the clutch into neutral, disconnecting the power from the hoisting mechanism, and applies the brake (shown in orange).

It is to be remembered that Gerlinger's stop governing upward movement is actuated **ONLY** by the load and the downward stop is actuated by a setscrew on the right rear rackbar.

The plaintiff and the patentee built but one machine containing a load-actuated upward movement stop bar (No. 67). It had defects which in actual operation became obvious. If the load was not of sufficient height to engage bar 67 by the time the rackbars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and the hoist mechanism would be subject to damage, due to upward

movement beyond the designed range, thus either stripping the pinion or the rack teeth.

This the patentee and his assignee corrected by eliminating bar 67 and placing the upward [70] movement stop on the rackbar. Exhibit 6 shows the new means which Gerlinger adopted to govern upward movement. No. 91 on the rackbar engaged element No. 90, which in turn engaged bell crank No. 66. The action of Nos. 90, 91 and 66 performed the same function with regard to upward movement of the hoist that Nos. 65 and 66 performed in the downward movement. Nos. 90 and 91 will not be found in the drawings or specifications of the patent, inasmuch as they were adopted after the application had been filed. But stops which automatically disconnect power from hoisting mechanism, by throwing the clutch into neutral and applying brakes, are not new.

The Dingee patent 414380 (Exhibit 59) issued November 5, 1889, clearly disclosed such a device. It relates to a stationary elevator or hoist. It discloses a clutch manually operated, by which power is transmitted to the hoisting mechanism and when power is thus applied, upward or downward movement is communicated to the load lifting means; when the load reaches a predetermined position, a projection on the lift engages a stop on a cable by which the clutch is manually operated, throws it into neutral and simultaneously applies the brake. (See Exhibit 60). [71]

The Nicholson patent 134045 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger's drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a pre-determined extent in either direction and means for simultaneously applying a brake whenever the clutch is in neutral. The only material difference in structure between that shown in plaintiff's patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels.

The French and Pavey patent No. 1360917, (Exhibit 64), issued November 30, 1920, covers a device consisting of a hoist mounted on a truck. [72]

Lumber or any other portable commodity, within the capacity limits of the truck, can be picked up, hoisted, transported to another place and deposited. It is a FRONT-END truck and in that respect differs from the structure disclosed by plaintiff's patent to the same extent as does Nicholson's. The

stop which actuates the clutch and throws it into neutral and causes a brake to be applied consists of a nut on a threaded main shaft which engages lugs or collars which, by appropriate connection, throws the clutch into neutral and applies the brake. The operation is similar to that adopted by the defendant. (See Exhibit 65).

The patent to Towson, et al, 1,337,804, (Ex. 66), issued April 20, 1920, is a self-propelled industrial truck, carrying a load in the front end, having a hoist with limited movement, disclosing automatic means for disconnecting power from the hoisting mechanism and simultaneously applying a brake. It does not disclose a clutch inasmuch as it is an electrically operated machine. The [73] automatic stop merely breaks an electrical contact and thereby disconnects power. (Exhibit 67).

The Carr patent (Exhibit 69), No. 1407124, issued February 21, 1922, is a self-propelled electrically operated elevator truck with a front-end lift. It contains no clutch but by making and breaking the electrical contact, connects or disconnects the source of power. It has an automatic brake and by virtue of certain stops, the power is disconnected and the brake automatically applied both at predetermined upper and lower limits of travel.

It will thus be seen that in hoists and in elevators, whether stationary or movable, and irrespective of the source or kind of power, long prior to the time of Gerlinger, men had recognized the problem of providing means for automatically limiting upward

and downward travel of load lifting means by disconnecting the source of power from the lifting means and of simultaneously applying a brake to prevent further movement of those means. Divers kinds of means have been efficiently employed. In each of the cases above referred to, the stopping of upward or downward movement was not [74] dependent upon the presence of a load upon the load lifting means. The particular means described by Gerlinger in his drawings and specifications, so far as limitation of upward movement is concerned, is bar No. 67, which is only operative when a load is present and is, at times, inoperative when the load was not sufficiently high, or so placed, or of such a character as not to engage and move that bar. The automatic stop of upward movement adapted by the defendant is not dependent upon the presence of a load and is positive in character.

Before considering whether or not defendants infringed upon Gerlinger, it becomes necessary to determine what, if anything, he invented. Has he exercised inventive genius or has he merely aggregated well known devices, gaining neither new nor better results than were known to or utilized by the previous art.

Of what does his device consist. He speaks of it as a lumber carrier. He insists that a lumber carrier is to be distinguished from other carriers because it connotes a carrier of a particular kind, namely, a straddle type carrier. [75]

The Master is of the opinion that the patentee gained nothing by the use of the term "lumber carrier". Carriers of the type in question are adopted for and actually used for elevating, transporting and depositing objects other than lumber. They can and have been used for carrying pipe, cement, bricks and other things. The art involved is that of self-propelled carriers, having load lifting and lowering means. An inventor cannot avoid anticipation or acquire patent rights by declaring that his device is limited to the use of a particular commodity nor can an infringer avoid infringement by asserting that he uses his device for carrying a different commodity than that mentioned by the patentee in his specifications or drawings.

Art

The art which is to be considered, broadly speaking, is that of hoists and elevators, or more narrowly, that of hoists and elevators mounted on wheels; while most narrowly limited it is that of hoists and elevators on wheels with means of self-[76] propulsion. That all of these things were old does not of itself exclude invention but it definitely limits patentability to improvements in these fields. He who attempts to obtain a patent in a well occupied art must necessarily be limited to a patent of the specific means shown and a narrow range of mechanical equivalents.

Where the improvement consists in NEW means for obtaining a result heretofore accomplished by

other means, generally speaking, the applicant can obtain a patent only on the NEW means which he has disclosed and is not entitled to protection as to ALL means adopted for the accomplishment of that result.

We may take for example the sweat-band in a hat. The previous art might disclose means of fastening sweat-bands to hats by sewing or glueing the band to the hat. An ingenious mind, conceiving the advantages to be obtained by clamping the band to the hat, devises means for so doing. This might well be invention, entitling the inventor to a patent, but it would not entitle him to a patent on ALL means of attaching sweat-bands to hats, inasmuch as the art discloses various means [77] for so doing. His patent, therefore, would be limited to the NEW means he discloses with a range of equivalents of a similar nature; but not to means such as sewing, glueing or even securely incorporating the band with the fabric.

In the broad field of hoists and elevators, automatic means for disconnecting the source of power from the automatic mechanism and automatically applying the brake to that mechanism were old. In the narrower field of wheeled hoists and even as to self-propelled wheeled hoists it was old. The problem had been conceived and means provided. Gerlinger can only claim that he perceived the problem and he provided a NEW or DIFFERENT means of providing it. As has been stated his means

differed from his predecessors only in the LOAD-ACTUATED factor, to this he may well be entitled to patent protection; but if so, the defendant's mechanism does not infringe, because it does not utilize such a factor but operates irrespective of the presence of the load.

Having observed that the chain or cable loading mechanisms in straddle type lumber carriers [78] had certain inherent defects which could be remedied by a mechanism of a positive or rigid type such as rackbars and pinions, toggle lifts or screw type, it would seem that a mechanic of ordinary skill would at once appreciate the necessity of providing means to prevent damage to such mechanism should the operator fail to stop the raising or hoisting of the elevator when the proper limits of travel had been reached. Such means in the art of hoists and elevators had already been conceived and published. In fact both problem and means of solution had been disclosed.

What has been said with regard to the state of prior art or lack of invention does not imply that Gerlinger was in fact familiar with the state of the art or that he knowingly appropriated something that he knew was old. It may well be that he was in ignorance of the prior art and that his device was the result of original conception on his part. It is not sufficient that he should have invented, but he must have been the first to have invented. Unless he was such, he is not entitled to a patent.

But even though Gerlinger's concept of [79] automatic means of cessation of movement was original, so far as he was concerned, it was not NEW. To be patentable the concept must not only be ORIGINAL, but it must have the additional element of NOVELTY. In speaking of lack of originality and novelty, and therefore of consequent unpatentability, it must be remembered that this applies to the broad claims of ALL MEANS of automatic cessation of movement and braking. A patentee may be entitled to a patent of SPECIFIC means and not be entitled to broad protection or a wide range of mechanical equivalents.

When Gerlinger entered the field, he found self-propelled carriers equipped with hoisting mechanism adapted to pick up a load and later to deposit the load which was itself carried within the frame members instead of on or in front of the frame. If he added anything, it was merely the means for automatically disconnecting power from the hoist and applying a brake. Carriers of this kind actually consist of two machines, one a self-propelled truck, and the other a hoist. Except that they are disposed on or within the same frame, they are entirely independent. The truck could be [80] propelled without a hoist, and the hoist could be operated without regard to the propelling mechanism. They perform separate and wholly distinct functions. Obviously the man who conceived the idea of a self-propelled truck, equipped with a hoist that would pick up a load WITHIN the frame members, dis-

played inventive genius of a high order, which the commercial success of the device demonstrates. It enabled the operator to straddle the load instead of approaching it from the side or from the end. It enabled loads to be spaced on a loading platform with only sufficient distance between, either laterally or longitudinally, to enable the frame to pass between the piles, and it likewise overcame the necessity of counterweighting the rear end of a front-end hoist to equalize the load to be carried.

It is likewise obvious that invention may occur in improving the original conception.

But the question is whether or not he, whose improvement consists of merely adding either to the mechanism of propulsion or the mechanism of elevation, devices which are old in the art of [81] propulsion or old in the art of mechanical elevation, has invented anything. It is apparent that if Gerlinger had added his improvement of automatic disconnection of power from the hoist and an automatic brake to a STATIONARY elevator he would have invented nothing, because all those things were old. It is likewise apparent that had he added to the mechanism of propulsion an element old in that art, he would have invented nothing.

What he said was this:

“Up to the present time STRADDLE trucks, that is, those carrying loads WITHIN the frame, have no means of automatically stopping upward and downward movement of the hoist or load lifting means and applying a brake

thereto. These are desirable. In my carrier of that type I intend to use a hoist which has a stop and I adopt a type of hoist already known which is so equipped."

But, Gerlinger is not the inventor of means for automatically stopping or automatically braking the upward or downward movement of elevators or hoists.

The plaintiff has to a large degree confined the field of inquiry and consideration by stipulating that the defendant's front-end hoist does NOT infringe the patent.

This carrier (shown in Exhibits 41, 42 and 43) is a carrier adapted to hoisting, transporting, [82] lowering and depositing lumber. It comprises (1) a frame, (2) load lifting means mounted THEREIN, means for transmitting motion from a source of power to the load lifting means comprising (3) a clutch that can be operated manually and set in neutral position or so set as to cause the load lifting means to move in either direction, (4) means for manually moving the clutch to operative position, (5) automatic means for moving the clutch to neutral position upon movement of the load lifting means to a pre-determined extent in either direction and means for braking the transmission means whenever the clutch is moved to neutral.

In fact many of the parts comprising the automatic stop and braking means are interchangeable with those on the straddle type carrier manufac-

tured by defendant, which plaintiff contends infringes his patent. Plaintiff attempts to distinguish between defendant's front end truck and defendant's straddle type truck by asserting, first, that in the front end truck the load lifting means are not mounted THEREIN but that they are mounted THEREON or THEREFROM. [83] It is further asserted that the claims of his patent shall be limited or confined to carriers having load lifting means mounted in a frame with FOUR LIFTING points that lift positively and in unison. Plaintiff contends that thus construed, the Gerlinger patent eliminates front-end trucks having LESS than FOUR lifting points. The Master, however, can conceive no difference in the problem which would arise in a carrier having four lifting points and one having a lesser number provided positive means of lifting are used. Nor is it clear that any different problem arises when the load is carried within the frame members from that which exists when the load is carried at the end of the frame members. By positive lifting means the Master understands those which contain no element of friction, such as a drum, and no element of elasticity, such as might be present in a rope or a cable,—means, which, when power is applied, immediately and without variation lift or lower the load. Obviously if such means are to be adopted, automatic stops must be provided; otherwise, the machine will be wrecked. Gerlinger says he was the first to combine a hoist with a "O" shaped, self-propelled [84] carrier and, having done

so, he is entitled to a patent monopoly on any device which consists of a "O" shaped self-propelled carrier equipped with a power operated hoist having automatic stops capable of disconnecting power at predetermined points of upward or downward movements and simultaneously applying a brake. He is forced to this position because of the difference in the means disclosed by his patent, its drawings and specifications, and those employed by the defendant's machine.

But, given a self-propelled carrier having a "O" shaped frame, having mounted therein a hoist, is it invention to add a well known automatic stop to this apparatus, or is it merely a mechanical improvement?

Courts approach the defense of lack of originality or invention with great caution. The applicant for a patent is required to submit his drawings, specifications and claims of invention to the Patent Office, where it is examined, contrasted and compared by public officials, [85] presumably experts in separating mere improvements, obvious to the trained mechanic, from those involving inventive genius, and who are trained and learned in the history and progress of any given art and are presumed to be able to distinguish the new from the old. When the Patent Office has determined that originality and invention exist and issued its patent thereon, courts are bound to and should give great weight to this administrative decision. The object of the patent law is to encourage and not discourage inventors,

and to defeat and not shelter those who seek to reap where another has sown.

As has been many times observed, he who has appropriated the inventive concept of another, when sued for infringement, is prone to aver that the concept is not new, that it was long since anticipated and that it involved no exercise of invention, but was itself a mere appropriation of early concepts, or the exercise of ordinary mechanical skill. Such defenses, therefore, are properly regarded with suspicion and accepted only with caution. [86]

The courts have long recognized the comparative ease with which such contentions can be made. Invention may exist in taking well known elements and so combining them as to obtain new or better results. After the event, it may be wondered that the combination had never before been conceived, because both the problem and the answer seem obvious. But such afterthoughts must not be permitted to defeat actual invention.

Notwithstanding this salutary and well settled rule, and notwithstanding the prima facie presumption of validity arising from the issuance of a patent, courts are bound, when the question is raised, to consider the fact of originality and invention and, if it does not exist, so to declare. They have recognized that patent prosecutions partake of the nature of ex parte proceedings and that in some instances patents have been inadvertently or ill-advisedly allowed and issued. The plaintiff herein does not limit the scope of his patent to a SPE-

CIFIC means, whereby the clutch is thrown into neutral and the brake simultaneously [87] applied. In fact, if it did so, no infringement would exist, as admittedly the means used in the defendant's device are different in character, although the same in function. Plaintiff insists that his patent covers ANY means which will bring about the desired results. It is unnecessary to consider or decide whether or not, if the Gerlinger patent is limited to the SPECIFIC means, it discloses originality and invention, and is valid.

The patent may thus be analyzed:

1. A lumber carrier with a "O" shaped frame; (which he did not invent)

2. Load lifting means mounted THEREIN; (which he did not invent); or

- 2-a. Load lifting means mounted THEREIN, having FOUR lifting points that lift positively and in unison (which he may well have been the first to conceive)

3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction (which he did not invent); [88]

4. Means for manually moving the clutch (which he did not invent);

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction (which were old in the art of hoisting and

elevating loads in both stationary or moveable elevators and hoists);

6. Means for braking the transmitting means whenever the clutch is moved to neutral position (which were old in the art of hoisting and elevating loads in both stationary and moveable elevators and hoists).

It is a serious question whether the addition to the hoisting mechanism of stops and brakes constitutes invention in view of the state of the prior art, but the Master is of the opinion that it is not necessary to pass upon this question.

Plaintiff's automatic stops and brakes have no effect upon the operation of the lumber carrier in any respect, except that operation which concerns the load lifting mechanism. The carrier can [89] be operated forward and backward; it can be steered in any direction with the same facility and results WITH OR WITHOUT automatic stops and brakes. If Gerlinger conceived a new combination, it was a combination in the hoist and it is immaterial whether the hoist be moveable or stationary. Automatic stops disconnecting the source of power from load lifting means and predetermined points of upward and downward movement is not his invention; they are old; means for braking the transmitting means whenever the clutch connecting the source of power to the load lifting means is moved to neutral was not his invention; it was old. Because of this, his patent is not primary and cannot be accorded a broad construction, but must be lim-

ited to the particular means he describes and an exceedingly narrow field of equivalents.

If thus limited, it must be defined as an automatic stop actuated by the load itself in upward movement and an automatic stop controlling the downward movement of the kind and character shown [90] by his drawings and specifications. Under this limitation and construction of the patent the defendant's device does not infringe. Defendant achieves cessation of upward movement irrespective of the presence of the load and the means to control the downward movement is substantially different from that described by Gerlinger's plans and specifications. Even if it can be said that defendant's means of downward movement control is a mechanical equivalent of Gerlinger's means for such control, still infringement does not exist because defendant's device omits an essential element of Gerlinger's combination, namely, the LOAD-actuated stop governing upward movement. The only way in which Gerlinger's can be distinguished from the prior art of automatic stops and brakes and hoisting mechanisms is in the load-actuated device. He did not teach the world that lifting mechanisms, with either flexible or rigid lifting means, required automatic stops and automatic brakes. That it had known for years.

It is only after detailed study and consideration and with considerable reluctance that [91] the Master has reached his conclusion, a reluctance arising from the propriety and necessity of giving great

weight to the proceedings of the patent office. But the field in which Gerlinger labored was crowded. The necessity for automatic stops and automatic braking of load-lifting means was as real in stationary load-lifting devices as it was in moveable or self-propelled load-lifting devices. It was as great in a front-end truck carrier as it was in a straddle-frame carrier; it was as real in a carrier having two lifting points as it was in one having four. It existed in a carrier with a positive or rigid lifting means just as it did in one where those means were less positive or non-rigid. Unfortunately, others had seen the problem and others had given an efficient and satisfactory answer.

The Master, therefore, finds that under the construction given to Gerlinger's patent, defendants' device does not infringe and so reports to Your Honor.

Laches

In view of the Master's conclusion with regard to infringement, it may seem unnecessary [92] to discuss the question of laches. But, in view of the fact that the court may not approve the Master's finding and recommendation in that respect, he begs leave to report to the court his findings, conclusions and recommendations upon the subject of undue and inequitable delay.

Gerlinger's patent in suit, No. 1457025, issued May 29, 1923, on his application filed March 30, 1922. His bill of complaint herein was exhibited October 3, 1935.

As early as September, 1923, the defendant Clark & Wilson Lumber Company had purchased two Ross carriers, both of which have been in constant use ever since. These Ross carriers are of a straddle type with load-lifting means mounted in the frame, the lift is positive from four points working in unison; it has a clutch manually operated, which can be placed in neutral, and when in operative position moves the lift in either direction; it has means which, when the lift [93] has reached a pre-determined point in upward or downward movement, throw the clutch into neutral and apply a brake to the load-lifting means. The upward movement is not controlled by the movement of the load. The type of means adopted by Ross differs somewhat in construction from that employed by Gerlinger and from that employed by the defendant Willamette-Hyster Company, but efficiently achieves the desired result. If defendant Willamette-Hyster Company infringes Gerlinger, so does Ross. The infringing device in suit was first designed and constructed by the Willamette Iron & Steel Company in September, 1926. The defendant Willamette-Hyster Company succeeded to the carrier business of the former in 1929, and both companies, during their respective periods of operation, continuously manufactured and sold the alleged infringing device. The gross amount of defendant's sales of the alleged infringing carrier are approximately \$2,000,000.00.

At least as early as December, 1925, (Exhibit 22) the Ross carrier company advertised [94] its carrier in trade journals, such as "The Timberman", where it was claimed "The hoist is positive and uniform at all four POINTS of lift. Automatic cut-outs are provided to prevent damage by unskilled operators". To the user and to the Ross Company's competitors this could mean but one thing, namely, that means had been provided for automatically disconnecting the source of power from the load-lifting mechanism.

Ross' advertisement in The Timberman of November, 1926, is even more specific. It is there said:

"POWER TAKE OFF

In constant mesh with transition gear. *Connected to hoisting mechanism by single disc dry clutch, which is controlled by single hand lever for starting or stopping hoists in either direction. Equipped with automatic brakes of ample size. Load may be raised or lowered while carrier is in motion. Hoist stops automatically at upper and lower limit of travel.*" (Italics mine)

Such language, to the trade and to Ross' competitors, is susceptible of but one meaning,—namely that the hoist mechanism had a clutch for [95] connecting and disconnecting the load lifting means from the source of power; that it had an automatic brake and that means were provided for disconnecting the source of power from the hoist at pre-determined points of upward and downward movement.

Gerlinger and the other officers of the plaintiff insist that they had no knowledge that either Ross or Willamette Hyster employed automatic means for disconnecting power from the hoist and automatically applying a brake. Except for the testimony of G. A. Grab, the managing director of the carrier department of the defendant Willamette Hyster Company, there is no DIRECT proof that they had such knowledge. Grab was employed by Gerlinger and the plaintiff from 1921 to January 1, 1926. He was in charge of its sales and service. He claims that shortly after Clark & Wilson purchased Ross carriers in 1923 he inspected them, observed automatic stops and brakes and reported same on several occasions to the patentee Mr. Gerlinger. Certainly it is entirely likely that while so employed by plaintiff he became familiar [96] with the construction of the Ross carrier. It is difficult to believe that he would not have been sufficiently interested in a competitor's product not to make such inspection and ascertain such facts. Mr. Gerlinger, however, specifically denies that Mr. Grab ever spoke to him about the stop mechanism of the Ross carrier, although he admits that he may have mentioned the fact that Clark & Wilson had purchased Ross carriers.

When Grab left the employment of plaintiff it is evident that some feeling of hostility existed between Gerlinger and himself. He immediately obtained employment with one of plaintiff's competitors, the Willamette Iron & Steel Company, and he is

now a highly interested witness. For these reasons the Master would hesitate to find that Gerlinger had antecedent knowledge of Ross' stop and brake mechanism based solely upon Mr. Grab's testimony.

However, there are other persuasive facts in the record on this subject. The market for straddle type carriers is comparatively limited. The competitive field is largely occupied by Ross, Willamette Hyster and plaintiff. The competition between them is and [97] has been keen. These carriers are not machines which are hid away or concealed from public and general observation. In each type of machine the automatic stops are in plain view and the automatic brake is likewise visible to casual inspection or, at least, its presence is plainly indicated. When used, these carriers travel through lumber yards and over loading platforms, largely open to the public and certainly to anyone having occasion to visit the mill plant. They often travel upon the public highways.

It is difficult to conceive that under such circumstances any competing manufacturer did not have accurate and complete knowledge of the structure employed by the others. Each proclaimed the superiority of its product, each was necessarily compelled to explain the particular point of alleged superiority of his device over those of his competitors; each naturally would be curious as to what the competitor had done and of what the new competing models would consist. To believe that plaintiff and its executive officers, its salesmen and mechanical department, were not fully conversant with

the details of the structure of the competing machine is to place a heavy burden upon [98] the Master's credulity. To fully accept the denial of knowledge compels one to believe and find that plaintiff in this case failed to do what ordinary prudence, business judgment and common sense would dictate, namely, to avail itself of knowledge which was advertised, and of inspections which were easily and readily available. If it should be conceded that the officers of the company did not know the ACTUAL structural details of Ross and of Willamette Hyster during all these years, they must have been aware that the Ross and Willamette-Hyster machines embodied automatic means for throwing the clutch into neutral and applying the brake to the load lifting mechanism, and inasmuch as plaintiff asserts that the patent includes ANY means, it follows that they must have been aware that the Ross and Willamette carriers infringed the patent.

To use the language of Judge Lurton (sitting with J. J. Taft and Hammond) in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 492,—

“Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism.” [99]

Indulging plaintiff with the possibility that its officers and its assignor might not have had knowledge of defendant Clark & Wilson Lumber Company's alleged infringing use from 1923 until the fall of 1935, still "there devolves upon plaintiff the burden of disclosing impediment to earlier action or of showing, if ignorant of his rights, how he remained ignorant so long."

Window Glass Machinery Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645, 650.

This burden, in the Master's opinion, plaintiff has not sustained. By failure to give notice of infringement and failure to act, it has permitted the defendant Clark & Wilson Lumber Company, during this period of at least twelve years, to purchase eleven Ross carriers and several Willamette-Hyster carriers, and it has likewise permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in the manufacture of its carrier.

The Clark & Wilson Lumber Company is a purchaser and user. Its knowledge of plaintiff's patent [100] is constructive only. As to it, plaintiff has been guilty of laches of such character that even had the Master found infringement, plaintiff would not be entitled to relief either for accounting or by way of injunction against further use. No patentee should be granted relief who has permitted an ultimate user to expend large sums of money in the purchase of infringing machines and to use them without objection over a long period of years

without at any time informing such user that the machine so purchased and used was an infringement of the patent.

The Willamette-Hyster Company stands in a somewhat different position; its managing director Grab knew of the existence, the nature and extent of the patent in suit. By this knowledge it is bound. On the other hand, as the Master holds, plaintiff has failed to sustain the burden of proving not only that it was ignorant of the infringement but why and how, under the circumstances, it could be ignorant of it. He finds, therefore, that it had such knowledge. It knew that the Willamette-Hyster Company was an active competitor in its field, that it was investing [101] large sums of money in the development, manufacture, sale and distribution of its carriers. It permitted the Willamette-Hyster Company so to do, making no objection whatsoever for approximately nine years. Its laches, therefore, should prevent its obtaining any accounting for losses, gains or profits, even though plaintiff might otherwise be entitled to an injunction against further infringement. This question, however, becomes academic in view of the fact that the Master finds no infringement.

The Master has refrained from citations of authority because of the length of this report and the fact that they are collated in the briefs and are discussed in the transcribed argument of counsel. He has examined all of the citations given and many others and desires to record his appreciation of the

care and skill with which this case has been presented by counsel on both sides.

Seven days were consumed in the hearings before the Master and he has expended fourteen days' additional time in the consideration of the testimony, the briefs of counsel, the examination of the authorities and the preparation of his report. He prays that his [102] compensation may be fixed and allowed and that the court make suitable order for the payment of these sums allowed.

He transmits to the court a transcript of the testimony and of all exhibits, Nos. 1 to 79 as disclosed by the record, and will make such further reports as the court may from time to time require.

Respectfully submitted,

ROBERT F. MAGUIRE

Master in Chancery.

[Endorsed]: Filed July 1, 1937. [103]

And Afterwards, to wit, on the 25th day of August, 1937, there was duly Filed in said Court, Plaintiff's Exceptions to the Master's report and Proposed findings and conclusion, in words and figures as follows, to wit: [104]

[Title of District Court and Cause.]

PLAINTIFF'S EXCEPTIONS TO THE MASTER'S REPORT AND PROPOSED FINDINGS AND CONCLUSION.

Dallas Machine & Locomotive Works, Inc., a Corporation, the above named plaintiff, excepts to the report of Robert A. Maguire, Esq., the standing Master, filed in this cause on the 1st day of July, 1937, for the reasons hereinafter specifically pointed out.

Exception No. 1.

To the following statement of the Master on page 7 of his report:

"The machine shown in the patent is a self-propelled carrier containing a lifting device which picks up a load WITHIN and not UPON or in front of its frame, and enabling the load to be picked up, transported, and deposited as desired. None of these things were new in the art when the patentee applied for his patent."

The plaintiff excepts because this statement is an incomplete and incorrect statement of the nature of the invention involved, and is contrary to the evidence in this cause. [105]

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

I.

The invention described by the patent in suit is an improvement of so-called straddle type of lumber carriers.

“The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load within and not upon or in front of its frame, and enabling the load to be picked up, transported and deposited as desired.” (Master’s report page 7)

“It enabled the operator to straddle the load instead of approaching it from the side or from the end. It enabled loads to be spaced on a loading platform with only sufficient distance between, either laterally or longitudinally, to enable the frame to pass between the piles, and it likewise overcame the necessity of counterweighting the rear end of a front-end hoist to equalize the load to be carried.” (Master’s report page 22)

The specification of the patent in suit (page 1, line 14) states;

“An object of the invention is to provide an improved form of lifting device that will have four lifting points that lift positively and in unison.

Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either

direction is reached, and also apply a brake [106] mechanism.”

The specification of the patent in suit (page 2, lines 71 to 80) states;

“Any desired form or reversible clutch may be used and any old or common form of brake for the driving mechanism of the lifting device, and therefore it has not been thought necessary to illustrate the details of any specific clutch or brake mechanism. Other details may be varied in their form and location, and in general the invention is intended to be limited only by the scope of the appended claims.”

Exception No. 2.

The plaintiff excepts to the following statement of the Master on page 13 of his report:

“The Nicholson patent 1,340,458 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger’s drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a predetermined extent in either direction and means for simultaneously applying a brake whenever the clutch

is in neutral. The only material difference in structure between [107] that shown in plaintiff's patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels."

Exception No. 3.

The plaintiff excepts to the following statement of the Master on pages 15 and 16 of his report:

"It will thus be seen that in hoists and elevators, whether stationary or movable, and irrespective of the source or kind of power, long prior to the time of Gerlinger, men had recognized the problem of providing means for automatically limiting upward and downward travel of load lifting means by disconnecting the source of power from the lifting means and simultaneously applying a brake to prevent further movement of those means. Divers kinds of means have been efficiently employed. In each of the cases above referred to, the stopping of upward or downward movement was not dependent upon the presence of a load upon the load lifting means."

Exception No. 4.

The plaintiff excepts to the following statement of the Master on pages 16 and 17 of his report:

"He (Gerlinger) insists that a lumber carrier is to be distinguished from other carriers

because it connotes a carrier of a particular kind, namely, a straddle type carrier.

The Master is of the opinion that the patentee gained nothing by the use of the term 'lumber [108] carrier'. Carriers of the type in question are adopted for and actually used for elevating, transporting and depositing objects other than lumber. They can and have been used for carrying pipe, cement, bricks and other things. The art involved is that of self-propelled carriers, having load lifting and lowering means."

Exception No. 5.

The plaintiff excepts to the following statement of the Master on pages 17 and 18 of his report:

"The art which is to be considered, broadly speaking, is that of hoists and elevators, or more narrowly, that of hoists and elevators mounted on wheels; while most narrowly limited it is that of hoists and elevators on wheels with means of self-propulsion. That all of these things were old does not of itself exclude invention but it definitely limits patentability to improvements in these fields."

The reason for the plaintiff's Exceptions Nos. 2, 3, 4, and 5 is that these statements of the Master are, each of them, an incorrect statement of the nature and classification of the invention covered by the patent in suit. The invention does not concern a mere truck having some sort of wheel-mounted platform body capable of carrying lumber or other

material piled on it, but relates specifically to carriers of the STRADDLE type adapted for use and capable of functioning as stated by the Master in his report on pages 7 and 22.

The Master ought to have found and certified instead [109] the following:

Plaintiff's Proposed Finding

II.

The evidence shows that the combination set forth by claim 4 of the patent in suit specifically concerns and is an improvement upon lumber carriers of the straddle type, which are in a class apart from hoists and elevators, stationary or wheel mounted, and the hoisting mechanism and control thereof described in hoists and elevators does not suggest the building of lumber carriers of the straddle type with load lifting means having four lifting points which lift positively and in unison, and provided with means automatically limiting the movement of the load lifting devices to a predetermined extent in either direction and applying a brake. (See testimony of defendants' expert witness Grab, Trans. of Test. pages 666 and 667.) [110]

Exception No. 6.

The plaintiff excepts to the following statement of the Master on page 21 of his report:

"When Gerlinger entered the field, he found self-propelled carriers equipped with hoisting

mechanism adapted to pick up a load and later to deposit the load which was itself carried within the frame members instead of on or in front of the frame. If he added anything, it was merely the means for automatically disconnecting power from the hoist and applying a brake. Carriers of this kind actually consist of two machines, one a self-propelled truck, and the other a hoist."

Exception No. 7.

The plaintiff excepts to the following statement of the Master contained on page 8 of his report:

"The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator."

Exception No. 8.

The plaintiff excepts to the following statement of [111] the Master on page 33 of his report:

"The field in which Gerlinger labored was crowded. The necessity for automatic stops and

automatic braking of load-lifting means was as real in stationary load-lifting devices as it was in moveable or self-propelled load-lifting devices. It was as great in a front-end truck carrier as it was in a straddle-frame carrier; it was as real in a carrier having two lifting points as it was in one having four. It existed in a carrier with a positive or rigid lifting means just as it did in one where those means were less positive or non-rigid. Unfortunately, others had seen the problem and others had given an efficient and satisfactory answer.”

Exception No. 9.

The plaintiff excepts to the following statement of the Master on pages 24 and 25 of his report:

“Plaintiff attempts to distinguish between defendant’s front end truck and defendant’s straddle type truck by asserting, first, that in the front end truck the load lifting means are not mounted THEREIN but that they are mounted THEREON or THEREFROM. It is further asserted that the claims of his patent shall be limited or confined to carriers having load lifting means mounted in a frame with FOUR LIFTING points that lift positively and in unison. Plaintiff contends that thus construed, the Gerlinger patent eliminates front-end trucks having LESS than FOUR lifting points. The Master, however, can conceive no difference [112] in the problem which would arise in a carrier having four lifting

points and one having a lesser number provided positive means of lifting are used. Nor is it clear that any different problem arises when the load is carried within the frame members from that which exists when the load is carried at the end of the frame members. By positive lifting means the Master understands those which contain no element of friction, such as a drum, and no element of elasticity, such as might be present in a rope or a cable,—means, which, when power is applied, immediately and without variation lift or lower the load. Obviously if such means are to be adopted, automatic stops must be provided, otherwise, the machine will be wrecked.”

Exception No. 10.

The plaintiff excepts to the following statement of the Master on pages 25 and 26 of his report:

“Gerlinger says he was the first to combine a hoist with a “O” shaped, self-propelled carrier, and, having done so, he is entitled to a patent monopoly on any device which consists of a “O” shaped self-propelled carrier equipped with a power operated hoist having automatic stops capable of disconnecting power at predetermined points of upward or downward movements and simultaneously applying a brake. He is forced to this position because of the difference in the means disclosed by his patent, its drawings and specifications, and

those employed by the defendant's machine.

[113]

But, given a self-propelled carrier having a "O" shaped frame, having mounted therein a hoist, is it invention to add a well known automatic stop to this apparatus, or is it merely a mechanical improvement?"

Exception No. 11.

The plaintiff excepts to the following statement of the Master on page 32 of his report:

"The only way in which Gerlinger's can be distinguished from the prior art of automatic stops and brakes and hoisting mechanisms is in the load-actuated device. He did not teach the world that lifting mechanisms, with either flexible or rigid lifting means, required automatic stops and automatic brakes. That it had known for years."

Exception No. 12.

The plaintiff excepts to the following statement of the Master on page 23 of his report:

"What he (Gerlinger) said was this:

'Up to the present time straddle trucks, that is, those carrying loads within the frame, have no means of automatically stopping upward and downward movement of the hoist or load lifting means and applying a brake thereto. These are desirable. In my carrier of that type I intend to use a hoist already known which is so equipped.'

But, Gerlinger is not the inventor of means [114] for automatically stopping or automatically braking the upward or downward movement of elevators or hoists."

Exception No. 13.

The plaintiff excepts to the following statement of the Master on pages 19 and 20 of his report:

"Gerlinger can only claim that he perceived the problem and he provided a NEW or DIFFERENT means of providing it. As has been stated his means differed from his predecessors only in the LOAD-ACTUATED factor, to this he may well be entitled to patent protection; but if so, the defendant's mechanism does not infringe, because it does not utilize such a factor but operates irrespective of the presence of the load.

Having observed that the chain or cable loading mechanisms in straddle type lumber carriers had certain inherent defects which could be remedied by a mechanism of a positive or rigid type such as rackbars and pinion, toggle lifts or screw type, it would seem that a mechanic of ordinary skill would at once appreciate the necessity of providing means to prevent damage to such mechanism should the operator fail to stop the raising or hoisting of the elevator when the proper limits of travel had been reached. Such means in the art of hoists and elevators had already been conceived

and published. In fact both problem and means of solution had been disclosed.” [115]

The reason for plaintiff’s Exceptions Nos. 6 to 13 is that these statements are, each of them, contrary to, and entirely unsupported by the evidence in this cause.

The Master instead ought to have found and certified the following:

Plaintiff’s Proposed Finding
III.

When Gerlinger entered the field, he found straddle type lumber carriers which utilized cable or chain lifts. Defects were discovered by Gerlinger in that the cable did not give a positive and uniform lift at all four points under all conditions. (Trans. of Test. pages 19 and 20; Master’s report page 7 and comment by Master on claim element 2-a, page 29 of his report.)

Lumber carriers with cable or chain lifts are shown by the patent to Harry B. Ross, No. 1,209,209, dated December 19, 1916 (see plaintiff’s Exhibit 1A, Trans. of Test. page 15); by the Ross patent No. 1,271,947, dated July 9, 1918 (see plaintiff’s Exhibit 1B); by the patent to William A. Overlin, No. 1,289,529, dated December 31, 1918 (see plaintiff’s Exhibit 1C); and by the patent to said Overlin, No. 1,349,292, dated August 10, 1920 (see plaintiff’s Ex-

hibit 1D); (see pages 15 and 16 of Trans. of Test.)

The inefficiency of the straddle type lumber carrier having a cable lift, altho thus present for several years, was not remedied until plaintiff entered the field. Gerlinger conceived improvement in the straddle type lumber carriers of [116] providing rack bars and pinions driven from the power element of the carrier as the lifting means, thus providing a "lifting means that will have four lifting points that will lift positively and in unison". (Patent specification, page 1, line 14; Master's report pages 7 and 29).

This earlier improvement of Gerlinger further provided automatic means whereby the power would be automatically disconnected from the hoisting mechanism when it had operated to a predetermined extent in either direction, but had no automatic means for applying also a brake. On such improvement Gerlinger applied for his patent No. 1,422,958 dated July 18, 1922, entitled Lumber Carriers. (see plaintiff's Exhibit 1, Trans. of Test. page 15.)

The application for this earlier patent was filed August 30, 1921, and was still pending when the application for the patent in suit was filed, which was March 30, 1922.

While Gerlinger was building a lumber carrier of the straddle type according to the said improvement described by patent No. 1,422,-

958, he discovered that, in the course of travel of this carrier, the vibration of the carrier and other factors tended to cause the load lifting mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground. (See Master's report page 7.) To overcome such settling of the load lifting means, Gerlinger then further improved his positive load-lifting means and control thereof by adding an [117] automatic brake, and thereupon filed his application for the patent in suit, No. 1,457,025, dated May 29, 1923. [118]

Exception No. 14.

The plaintiff excepts to the following statement of the Master on page 29 of his report:

“The patent (claim sued on) may thus be analyzed:

1. A lumber carrier with a “O” shaped frame; (which he did not invent)

2. Load Lifting means mounted THERE-IN; (which he did not invent); or

2-a. Load lifting means mounted THERE-IN, having FOUR lifting points that lift positively and in unison (which he may well have been the first to conceive)

3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means

to move in either direction (which he did not invent);

4. Means for manually moving the clutch (which he did not invent);

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction (which were old in the art of hoisting and elevating loads in both stationary or moveable elevators and hoists);

6. Means for braking the transmitting means whenever the clutch is moved to neutral position (which were old in the art of hoisting and elevating loads in both stationary and moveable elevators and hoists).” [119]

Such statement is not a correct analysis of the combination described by claim 4 of the patent sued.

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

IV.

Claim 4 of the patent is to be analyzed as follows:

1. A lumber carrier with a “O” shaped frame;

2. Load lifting means mounted THEREIN;
or

2-a. Load lifting means mounted THEREIN, having FOUR lifting points that lift positively and in unison;

3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction;

4. Means for manually moving the clutch;

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction;

6. Means for braking the transmitting means whenever the clutch is moved to neutral position.

In determining the patentable novelty of a combination, it is immaterial whether the individual elements thereof are new or old, or whether they coact successively or simultaneously. Invention may consist of uniting the elements in a new means, [120] which renders the combination patentable as an entirety. [121]

Exception No. 15.

The plaintiff excepts to the following statement of the Master on pages 31 and 32 of his report:

“If Gerlinger conceived a new combination, it was a combination in the hoist and it is immaterial whether the hoist be moveable or stationary. Automatic stops disconnecting the points of upward and downward movement is not his invention; they are old; means for braking the transmitting means whenever the clutch

connecting the source of power to the load lifting means is moved to neutral is not his invention; it was old. Because of this, his patent is not primary and cannot be accorded a broad construction, but must be limited to the particular means he described and an exceedingly narrow field of equivalents.

If thus limited, it must be defined as an automatic stop actuated by the load itself in upward movement and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specifications. Under this limitation and construction of the patent the defendant's device does not infringe. Defendant achieves cessation of upward movement irrespective of the presence of the load and the means to control the downward movement is substantially different from that described by Gerlinger's plans and specifications. Even if it can be said that defendant's means of downward movement control is a mechanical equivalent of Gerlinger's means for such control, [122] still infringement does not exist because defendant's device omits an essential element of Gerlinger's combination, namely, the LOAD-actuated stop governing upward movement."

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

V.

The prior art on which defendants rely for anticipation shows merely some of the elements of the patent claim 4 in suit, but does not show the entire combination of said claim.

Furthermore, these patents are not in the same art as the invention covered by the patent in suit. They would not suggest the building of a straddle type of lumber carrier, and therefore would not suggest the combination described by claim 4 of the patent in suit. (See testimony of Grab, defendants' expert witness, Trans. of Test. pages 666 and 667.)

The defendants concede that the entire prior art, introduced in evidence as anticipation, is in principle of construction and operation the same as that illustrated by the Carr patent, No. 1,407,124, dated February 21, 1922; defendants' Exhibit 69 describing an Elevator Truck (see Trans. of Test. pages 610, 666, and 667). This Carr patent was cited and considered by the Examiner of the Patent Office in passing on patentability of claim 4 of the patent in suit and held not to anticipate the same. (See File Wrapper of Patent [123] in suit, Plaintiff's Exhibit 5, page 17; Trans. of Test. page 27.) The judgment of the Patent Office is entitled to the highest respect and must be presumed to be right. This presumption can only be overcome by clear and convincing proof that it was

wrong. In the instant case, this presumption is strengthened, since all the devices relied on by defendants as anticipating the combination described by claim 4 are in principle of construction and operation the same as illustrated by said Carr patent, which, as stated, was cited and considered by the Patent Office in granting the patent in suit. (See 2 Walker of Patents, 6th Ed. Sec. 525, page 615.)

The defendants having adopted the combination described by claim 4 of the patent in suit therefore cannot deny its utility.

Gerlinger's said earlier patent, No. 1,422,958, was still pending when he filed his application for the patent in suit; therefore said earlier patent may not be cited against, and has no bearing on the patentable novelty in its entirety of the combination stated by claim 4 of the patent in suit. (See *Traitel Marble Co. v. U. J. Hungerford Brass & Copper Co.* 22 Fed. (2d) 259, 260; C. C. A. (2d) 1927.)

The plaintiff and the patentee built but one machine containing a load-actuated upward movement stop bar (No. 67.) It had defects which in actual operation became obvious. If the load [124] was not of sufficient height to engage bar 67 by the time the rackbars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and the hoist mechanism would be subject to damage, due to

upward movement beyond the designed range, thus either stripping the pinion or the rack teeth.

This the patentee and his assignee corrected by eliminating bar 67 and placing the upward movement stop on the rackbar. Exhibit 6 shows the new means which Gerlinger adopted to govern upward movement. No. 91 on the rackbar engaged element No. 90, which in turn engaged bell crank No. 66. The action of Nos. 90, 91 and 66 performed the same function with regard to upward movement of the hoist that Nos. 65 and 66 performed in the downward movement. Nos. 90 and 91 will not be found in the drawings or specifications of the patent, inasmuch as they were adopted after the application had been filed. (Master's report pages 11 and 12)

This modification is included in the thought and objects expressed in the introduction of the patent specification (page 1, lines 14 to 22) and is within the express reservation of changes in detail contained in said patent specification. (Page 2, lines 71 to 80)

It is evident that it was not Gerlinger's purpose to limit the means for controlling the upward movement of the load lifting means by devices actuated only by the load carried by the [125] load lifting means, but to provide broadly automatic means for limiting THE MOVEMENT of the load lifting means to a predetermined extent in either direction and applying the brake. [126]

Exception No. 16.

The plaintiff excepts to the following statement of the Master on pages 10 and 11 of his report:

“The stops in defendant’s infringing device are not placed on the rackbar, and in fact the device does not use a rackbar. Nor is the stop which limits the upward movement of the hoist **ACTUATED BY THE LOAD**. Defendant’s means for disconnecting the clutch and applying the brake is shown in Exhibits 34, 52 and 56b. As is seen in Exhibit 52, power is transmitted by means of a clutch to a chain and sprocket (shown in yellow), which is fixed at the end of a threaded shaft, which in turn carries a traveling nut (colored in purple). Attached to this nut are suitable levers, which, as the nut is moved along the revolving threaded shaft, change their position, thus lifting or lowering the hoist, depending upon the direction in which the nut moves along the yellow shaft.

Referring now to defendant’s Exhibit 52, which delineates in detail the clutch shifting and braking mechanism, it will be seen that as the nut moves along the shaft it engages stops fixed on a moveable shaft (all colored in red). This action throws the clutch into neutral, disconnecting the power from the hoisting mechanism, and applies the brake (shown in orange).

It is to be remembered that Gerlinger’s stop governing upward movement is actuated **ONLY**

by the load and the downward stop is actuated by a setscrew on the right rear rackbar." [127]

Exception No. 17.

The plaintiff excepts to the following statement of the Master on page 16 of his report:

"The particular means described by Gerlinger in his drawings and specifications, so far as limitation of upward movement is concerned, is bar No. 67, which is only operative when a load is present and is, at times, inoperative when the load was not sufficiently high, or so placed, or of such character as not to engage and move that bar. The automatic stop of upward movement adapted by the defendant is not dependent upon the presence of a load and is positive in character."

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

VI.

The defendant's straddle type of lumber carrier embodying load lifting devices and control therefor are the same in principle of operation as those described by claim 4 of the patent in suit. (See Service Manual put out by defendant, Willamette-Hyster Company, constituting plaintiff's Exhibit 12, Trans. of Test. page 287. See further plaintiff's Interrogatory 3 (c) contained on page 3 and plaintiff's Interrogatory

4 contained in defendant's Answer to Plaintiff's Interrogatories, pages 2 and 3, said interrogatories and answers thereto constituting plaintiff's Exhibits 3 and 3-A, Trans. of Test. page 26. See [128] further Master's report page 35.)

Furthermore, the defendants admit infringement of the patent in suit, by paragraph XX, page 10 of their Answer. In this paragraph, the defendants plead laches of plaintiff as a bar to any recovery, accounting, or injunction by the plaintiff, and in order to lay a foundation for this plea, allege as a further and separate defense "that lumber carriers substantially identical in construction and operation with the lumber carriers complained of herein have been made, sold, and widely used throughout the United States of America for more than six years prior to the bringing of this suit". And in response to plaintiff's Motion for Particulars, defendant, Willamette-Hyster Company, admitted it manufactured and sold these lumber carriers. (See plaintiff's Motion for Bill of Particulars and defendant's particulars paragraph 8 (a) (b).)

Such allegation of the answer, because stating facts constituting the basis of defendants' alleged plea of laches constitutes an admission of infringement. [129]

The Master ought further to have found and certified the following:

Plaintiff's Proposed Finding

VII.

Claim 4 of the patent in suit should be construed so as to give full value to and protect the patented invention rather than to destroy its value. ("Ut res magis valeat quam pereat" quoted in *Eibel Co. v. Paper Co.* 261 U. S. 45, 63.)

Therefore on said admission of defendants and also on the evidence in this case, it must be held that the defendant, Willamette-Hyster Company, infringes upon the patent in suit.

The Master ought further to have found and certified the following:

Plaintiff's Proposed Finding

VIII.

The straddle type of lumber carrier used by the defendant, Clark & Wilson Lumber Company, has a construction for the control of the lumber lifting devices somewhat different from that employed by Gerlinger and from that employed by the defendant, Willamette-Hyster Company, but is the same in principle of construction and achieves the same result. (Master's report pages 34 and 35; Trans. of Test. page 301) By making and using the straddle type of lumber carriers embodying the combination of claim 4, the defendant, Clark & Wilson Lumber Co. also infringes claim 4. [130]

Exception No. 18.

The plaintiff excepts to the following statement of the Master on pages 23 and 24 of his report:

“The plaintiff has to a large degree confined the field of inquiry and consideration by stipulating that the defendant’s front-end hoist does NOT infringe the patent.

This carrier (shown in Exhibits 41, 42 and 43) is a carrier adapted to hoisting, transporting, lowering and depositing lumber. It comprises (1) a frame, (2) load lifting means mounted THEREIN, means for transmitting motion from a source of power to the load lifting means comprising (3) a clutch that can be operated manually and set in neutral position or so set as to cause the load lifting means to move in either direction, (4) means for manually moving the clutch to operative position, (5) automatic means for moving the clutch to neutral position upon movement of the load lifting means to a pre-determined extent in either direction and means for braking the transmission whenever the clutch is moved to neutral.

In fact many of the parts comprising the automatic stop and braking means are interchangeable with those on the straddle type carrier manufactured by defendant, which plaintiff contends infringes his patent.”

The Master instead ought to have found and certified the following: [131]

Plaintiff's Proposed Finding

IX.

The type of truck built by defendant, Willamette-Hyster Company "shortly before the filing of this suit" (Trans. of Test. page 339) and shown on the exhibit offered by defendants and marked 4' for identification (Ib. 343) shows a "small truck * * * with the load lifting devices across the front end", (Ib. 338), has hoisting mechanism and control therefor, but is not a lumber truck of the straddle type and is not an example of the construction and combination described by claim 4 of the patent in suit, and was therefore conceded by plaintiff not to be an infringement upon said claim. (Ib. 348)

[132]

Exception No. 19.

The plaintiff excepts to the following statement of the Master on pages 40 and 41 of his report:

"If it should be conceded that the officers of the company did not know the ACTUAL structural details of Ross and of Willamette-Hyster during all these years, they must have been aware that the Ross and Willamette-Hyster machines embodied automatic means for throwing the clutch into neutral and applying the brake to the load lifting mechanism, and inasmuch as plaintiff asserts that the patent includes ANY means, it follows that they must have been aware that the Ross and Willamette carriers infringed the patent.

To use the language of Judge Lurton (sitting with JJ. Taft and Hammond) in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 492,—

“Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism.”

Indulging plaintiff with the possibility that its officers and its assignor might not have had knowledge of defendant Clark & Wilson Lumber Company’s alleged infringing use from 1923 until the fall of 1935, still “there devolves upon plaintiff the burden of disclosing impediment to earlier action or of showing, if ignorant of his rights, how he remained ignorant so long.”

Window Glass Machinery Co. vs. Pittsburgh Plate Glass Co., 284 Fed. 645, 650. [133]

Exception No. 20.

The plaintiff excepts to the following statement of the Master on page 41 of his report:

“This burden, in the Master’s opinion, plaintiff has not sustained. By failure to give notice of infringement and failure to act, it has permitted the defendant, Clark & Wilson Lumber Company, during this period of at least twelve years, to purchase eleven Ross carriers and sev-

eral Willamette-Hyster carriers, and it has likewise permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in the manufacture of its carrier."

Exception No. 21.

The plaintiff excepts to the following statement of the Master on pages 41 and 42 of his report:

"The Clark & Wilson Lumber Company is a purchaser and user. Its knowledge of plaintiff's patent is constructive only. As to it, plaintiff has been guilty of laches of such character that even had the Master found infringement, plaintiff would not be entitled to relief either for accounting or by way of injunction against further use. No patentee should be granted relief who has permitted an ultimate user to expend large sums of money in the purchase of infringing machines and to use them without objection over a long period of years without at any time informing such user that the machine so purchased and used was an infringement of the patent." [134]

Exception No. 22.

The plaintiff further excepts to the following statement of the Master on pages 42 and 43 of his report:

"The Willamette-Hyster Company stands in a somewhat different position; its managing director Grab knew of the existence, the nature

and extent of the patent in suit. By this knowledge it is bound. On the other hand, as the Master holds, plaintiff has failed to sustain the burden of proving not only that it was ignorant of the infringement, but why and how, under the circumstances, it could be ignorant of it. He finds, therefore, that it had such knowledge. It knew that the Willamette-Hyster Company was an active competitor in its field, that it was investing large sums of money in the development, manufacture, sale and distribution of its carriers. It permitted the Willamette-Hyster Company so to do, making no objection whatsoever for approximately nine years. Its laches, therefore, should prevent its obtaining any accounting for losses, gains or profits, even though plaintiff might otherwise be entitled to an injunction against further infringement. This question, however, becomes academic in view of the fact that the Master finds no infringement."

The reason for plaintiff's Exceptions Nos. 19 to 22 is there is no evidence in the case to support said statements and conclusion, and they are contrary to the evidence in the case.

Furthermore, the plaintiff states that the above named [135] cases cited by the Master on page 40 and 41 of his report and referred to in above Exception No. 19, have no application to the premises because said cases are based on facts showing the presence of inequities which have no existence in

the instant case. This shows merely naked infringement by both defendants with admitted full knowledge of the patent on the part of the defendant, Willamette-Hyster Company, and with no denial of knowledge by the defendant, Clark & Wilson Lumber Company, and with no proof of detriment to either defendant; or proof of reliance upon belief that the patent is invalid based upon any information or advice that the patent is invalid; nor any claim of right on the part of either defendant; nor any proof on the part of either defendant that it would not have made, or sold, or used, the lumber carriers complained of if warned not to infringe by the plaintiff; or of any proof whatsoever that the defendants, or either of them, changed their position or suffered any loss by reason of plaintiff failing to bring this suit earlier; and, proof, on the other hand, by plaintiff that it filed this suit promptly after having actual knowledge of the defendants' infringement.

The testimony shows that defendant, Clark & Wilson Lumber Company, discarded the carriers which it had bought in 1923 and built new carriers embodying the patent in suit, which new carriers went into service November, 1932. (Trans. of Test. page 301) This defendant bought further of these lumber carriers from the defendant, Willamette-Hyster Company, a few of which were received about March 18, 1935. (Ib. page 510) [136]

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

X.

Plaintiff from 1922 to 1928 manufactured principally hydraulic lumber carriers of the type described in Gerlinger's patent No. 1,480,-257, dated January 8, 1924. (Plaintiff's Exhibit 14, Trans. of Test. page 68) Plaintiff believed lumber carriers with hydraulic lift had advantages. (Trans. of Test. page 257) Only ten lumber carriers with rack and pinion lift embodying combination of claim 4 of the patent in suit were built between October 21, 1921, and January, 1926. (Trans. of Test. pages 28, 521, and 522) But the hydraulic lift type of lumber carrier was found inefficient and discarded in 1929. (Trans. of Test. page 260) The further building of lumber carriers with rack and pinion lift, having in combination claim 4 of the patent in suit, was resumed about March 5, 1929, when a further delivery of this type of carrier was made. (Trans. of Test. page 390)

The plaintiff specifically denies that it had any knowledge of the infringements complained of in this suit. Except for the testimony of G. A. Grab, the managing director of the carrier department of the defendant, Willamette-Hyster Company, there is no DIRECT proof that the plaintiff had ACTUAL knowledge of the infringements complained of. Grab was employed by Gerlinger and the plaintiff from 1921 to January 1, 1926. * * * When Grab left the

employment of plaintiff, it is evident that some [137] feeling of hostility existed between Gerlinger and himself. He immediately obtained employment with one of plaintiff's competitors, the Willamette Iron & Steel Company, and he is now a highly interested witness. For these reasons, the Master would hesitate to find that plaintiff had antecedent knowledge of Ross's stop and brake mechanism. (Master's report pages 37 and 38)

The defendants admit by the answer to plaintiff's Motion for Bill of Particulars and plaintiff's Interrogatories that there was no conversation between plaintiff and defendants about the infringement complained of in this suit; and that defendants base their plea of laches entirely on plaintiff's failing to bring suit, notwithstanding defendants, Willamette-Hyster Company and its predecessors, were openly manufacturing and selling, and the defendant Clark & Wilson Lumber Company was openly using carriers which infringed upon plaintiff's patent. (See plaintiff's Motion for Bill of Particulars 9 (a), (b) found on page 4 of plaintiff's Motion for Bill of Particulars and the statement found on page 2 of defendants' Answer to Plaintiff's Motion for Bill of Particulars, viz., 9 (a), (b). See further plaintiff's Interrogatory No. 5 (a) and defendants' answer to said Interrogatory No. 5 (a).)

The Willamette-Hyster Company stands in a somewhat different position; its managing

director Grab knew of the existence, the nature and extent of the patent in suit. By this knowledge it is bound. (Master's report page 42)

[138]

Plaintiff first had actual notice of infringement by defendants in September 1935. The circumstances of such notice were, at that time the plaintiff sold two carriers to Shevlin-Hixon, of Bend, Oregon. In connection with this sale, plaintiff was asked to give a guarantee against infringement of patents. This caused plaintiff to make inquiry, since such guarantee had not been demanded in business previously done by Shevlin-Hixon Company with plaintiff. (See order and letter from Shevlin-Hixon Company to plaintiff, being plaintiff's Exhibits 7 and 8, Trans. of Test. page 38.)

Furthermore, in connection with the sale to the Shevlin-Hixon Company of the two carriers, there was a rumor that the plaintiff's carrier was an infringement of the patent rights held by the Willamette-Hyster Company, who were threatening to sue for infringement. (Trans. of Test. page 38) [139]

The Master ought further to have found and certified the following:

Plaintiff's Proposed Finding

XI.

Thus even if plaintiff were dilatory, as claimed by defendants, in bringing suit against

them for the infringement of plaintiff's patent mere delay in bringing suit on a patent unaccompanied by injury to the defendants does not establish laches. Laches is an affirmative defense, and the burden of proving all the elements essential to establishing this defense rests on the defendants. But no evidence was presented showing any injury to defendants resulting from inaction of the plaintiff in failing to bring this infringement suit earlier. The only proof introduced by the defendant, Willamette-Hyster Company, was that it and its predecessors together, up to the time of bringing this suit, October 3, 1935, manufactured and sold about three hundred infringing lumber carriers. (Trans. of Test. page 551) The gross amount defendant, Willamette-Hyster Company, and its predecessors received from said sales was approximately two million dollars. There was no proof of any money for equipment or otherwise to build these carriers. (Trans. of Test. page 716) It is to be presumed that these three hundred carriers were sold at some profit; thus this defendant was not put to any loss nor suffered any disadvantage by being permitted to manufacture and sell the three hundred carriers before plaintiff brought this infringement suit; but, to the contrary, it is to be [140] assumed that the sale by the defendant, Willamette-Hyster Company, and its predecessors, of the infringing lumber

carriers was to its advantage, bringing back to it its original outlay of capital invested in building these lumber carriers together with some profit on the investment.

The defendant, Willamette-Hyster Company, therefore has failed to sustain its plea of laches.

(Columbia Graphophone Co. v. Searchlight Horn Co. 236 Fed. 135, 139.)

(United Drug Co. v. Ireland Candy Co. 51 Fed. (2d) 226, at page 232.)

(Hamilton-Beach Mfg. Co. v. P. A. Geier Co. (C. C. A. 7) Dec. 21, 1934, 74 Fed. (2d) 992.) [141]

The Master ought further to have found and certified the following:

Plaintiff's Proposed Finding

XII.

With regard to defendant Clark & Wilson Lumber Company, the only evidence introduced shows that this defendant bought two so-called Ross carriers conceded to infringe plaintiff's patent in 1923. (Trans. of Test. page 500) These were continued in service until 1932 "when these carriers got into bad condition" and were dismantled and parts thereof used by Clark & Wilson Lumber Company to build two other straddle type lumber carriers, which were put into service about November, 1932. (Ib. page 301)

It appears that Clark & Wilson Lumber Company bought some straddle type lumber

carriers infringing the patent in suit from defendant, Willamette-Hyster Company, the first of these purchases being delivered about March 18, 1935. Clark & Wilson Lumber Company bought in all eleven more straddle type lumber carriers but introduced no testimony as to when, or from whom bought.

A patent gives to the patentee three exclusive and separable rights, (1) to make, (2) to use, and (3) to sell. The manufacturers and vendors of the Ross carrier are guilty of infringing upon plaintiff's exclusive rights to manufacture and sell the patented invention. The defendant Clark & Wilson Lumber Company have not paid anything to the plaintiff for the right to use these carriers. The Clark & Wilson Lumber Company should now be enjoined [142] from their further use of these carriers, if still workable. No testimony was introduced by defendant, Clark & Wilson Lumber Company, of any loss it would sustain if now enjoined from further use of the said carriers. The defendant, Clark & Wilson Lumber Company should also be enjoined from purchasing and using further carriers infringing upon the plaintiff's patent.

It further is probable, in the absence of denial, that the defendant, Clark & Wilson Lumber Company, was not entirely ignorant of the plaintiff's patent, and that after its said first two lumber carriers were discarded, it was per-

suaded to buy the further infringing lumber carriers by the salesmen of the company from whom it bought. The competitive field in straddle type of lumber carriers is largely occupied by Ross, Willamette-Hyster Company, and the plaintiff. The competition between them is and has been keen. It is to be presumed that each proclaims the superiority of its product, and each was necessarily compelled to explain the particular point of alleged superiority of its lumber carrier over those of its competitors. (Master's report pages 38 and 39)

The plea of laches on the part of defendant Clark & Wilson Lumber Company is thus not sustained. [143]

XIII.

The conclusion of the Master ought to have been as follows:

The plaintiff is entitled to a decree as prayed for in the complaint herein.

THEODORE J. GEISLER,

Attorney for Plaintiff.

Portland, Oregon,

August 25, 1937

[Endorsed]: Filed August 25, 1937. [144]

And afterwards, to wit, on the 20th day of September, 1938, there was duly filed in said Court, a Stipulation that further proceedings shall be pursuant to Federal Rules of Civil Procedure, in words and figures as follows, to wit: [146]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated between the parties that further procedure in this case shall be in accordance with the provision of Federal Rules of Civil Procedure, adapted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Ch. 651.

Dated September 20, 1938.

(Signed) T. J. GEISLER,

Attorney for Plaintiff.

(Signed) AUSTIN F. FLEGEL, JR.,

By P. A. JOSS,

of Attorneys for Defendants.

[Endorsed]: Filed September 20, 1938. [147]

And afterwards, to wit, on the 6th day of February, 1939, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[148]

[Title of District Court and Cause.]

OPINION

February 6, 1939

James Alger Fee, District Judge:

Plaintiff is the assignee of United States Letters Patent No. 1457025, issued May 29, 1923, to Carl Gerlinger, and relating to lumber carriers. This is a suit for infringement thereof by the defendants, limited by bill of particulars to Claim 4 of the patent, which reads:

“Claim 4 is as follows:

“A Lumber Carrier, comprising

1. A frame;
2. Load-lifting means mounted THEREIN;
3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction;
4. Means for manually moving the clutch to operative position;
5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in EITHER direction;
6. Means for braking the transmitting means whenever the clutch is moved to a neutral position.” [149]

The relief sought consists of (1) declaration of validity of the claim of the letters patent; (2) injunction against infringement and (3) accounting. The principal defenses are (1) lack of infringement in view of the prior art; (2) that the patentee was not the “first, sole, or any inventor or discoverer of the alleged invention”, but that it had been publicly used and sold more than two years prior to the application for patent and its principles are shown in several cited patents prior to that time; (3) that the principles were shown more than two years before that application by the Ross Carrier; (4) that

by reason of the rejection of broad claims by the Patent Office and acquiescence therein by claimant Gerlinger was limited to the precise details set up in the specifications (5) that the Gerlinger device is without utility; (6) that plaintiff was guilty of laches.

The analysis of this patent in the Master's Report is as follows:

“It may serve, in properly analyzing this patent, to state what was the previous state of the art and what the patentee claims to have invented. The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load **WITHIN** and not **UPON** or in **FRONT** of its frame, and enabling the load to be picked up, transported and deposited as desired. None of these things were new in the art when the patentee applied for his patent.

“These carriers, used originally and principally for the purpose of picking up and transporting piles of lumber, in the earlier stages of development utilized a cable or chain lift. Defects were discovered, in that the cable did not give a positive and uniform lift. The [150] next method of lifting means adopted was rackbars and pinions driven from the power plant of the machine. Gerlinger claims to have been the originator of this kind of a hoist as adapted to a straddle type lumber carrier. In

use it was found that, while the lift was positive and uniform, considerable care was required on the part of the operator manually to disconnect the power from the lifting mechanism when the load had reached the proper height, and that in the course of travel vibration of the machine and other factors tended to cause the mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground.

“The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator.

“This Gerlinger accomplished. The means disclosed by his patent and his drawings are as follows:

1. To limit upward movement and procure automatic means for moving the clutch to neutral (thus disconnecting the source of power from the hoisting mechanism) and simultaneously applying the brake, he proposed a bar

(No. 67, figure 3 of the patent drawing) moving on a pivot which would be engaged by the top of the load as it was hoisted, with suitable linkage which pushed the [151] clutch into neutral and applied the brake. This linkage and this brake are Nos. 48, 69, 74 and 76 of the patent drawing.

2. On downward movement of the hoist, to procure like automatic disconnection of the clutch and application of the brake, he proposed an adjustable set screw (No. 65) attached to the upper end of the right hand rear rack-bar, which, as the load was lowered, engaged one arm of a ball crank lever, (No. 66), the other end of which lever engaged the rear end of clutch lever No. 64 and in the movement threw the clutch into neutral and simultaneously actuated linkage, 74, which in turn, by means of a cam at its outer end, raised a brake, 76, engaging the shaft, 46, which drives the gears of the lifting mechanism.”

The Master found that the principles illustrated in the Gerlinger patent had been previously exemplified in the patents to which reference is made in another portion of his report:

“The Dingee patent 414380 (Exhibit 59) issued November 5, 1889, clearly disclosed such a device. It relates to a stationary elevator or hoist. It discloses a clutch manually operated, by which power is transmitted to the hoisting mechanism and when power is thus applied, up-

ward or downward movement is communicated to the load lifting means; when the load reaches a predetermined position, a projection on the lift engages a stop on a cable by which the clutch is manually operated, throws it into neutral and simultaneously applies the brake. (See Exhibit 60). [152]

“The Nicholson patent 134045 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger’s drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a predetermined extent in either direction and means for simultaneously applying a brake whenever the clutch is in neutral. The only material difference in structure between that shown in plaintiff’s patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels.

“The French and Pavey patent, No. 1,360,917, (Exhibit 64), issued November 30, 1920,

covers a device consisting of a hoist mounted on a truck.

“Lumber or any other portable commodity, within the capacity limits of the truck, can be picked up, hoisted, transported to another place and deposited. It is a FRONT-END truck and in that respect differs from the structure disclosed by plaintiff’s patent to the same extent as does Nicholson’s. The stop which actuates the clutch and throws it into neutral and causes a brake to be applied consists of a nut on a threaded main shaft which engages lugs or collars which, by [153] appropriate connection, throws the clutch into neutral and applies the brake. The operation is similar to that adopted by the defendant. (See Exhibit 65).

“The patent to Towson, et al., 1,337,804, (Ex. 66), issued April 20, 1920, is a self-propelled industrial truck, carrying a load in the front end, having a hoist with limited movement, disclosing automatic means for disconnecting power from the hoisting mechanism and simultaneously applying a brake. It does not disclose a clutch inasmuch as it is an electrically operated machine. The automatic stop merely breaks an electrical contact and thereby disconnects power. (Exhibit 67).

“The Carr patent (Exhibit 69), No. 1407124, issued February 21, 1922, is a self-propelled electrically operated elevator truck with a front-end lift. It contains no clutch but by

making and breaking the electrical contact, connects or disconnects the source of power. It has an automatic brake and by virtue of certain stops, the power is disconnected and the brake automatically applied both at predetermined upper and lower limits of travel."

The Master found, therefore, that the machine set out in Gerlinger's specifications is an aggregation of devices old in the art. He further found that while a combination containing a stopping mechanism actuated by a load was patentable in view of the prior art, a mechanism limiting the travel of the lift at certain set points either upward or downward would not be, and that Gerlinger showed nothing in the patent which would entitle him to a monopoly except a combination including the load stop. Laches of plaintiff was found by the Master to constitute an independent bar to the suit. This cause comes here upon exceptions [154] to these findings.

The field in which the Gerlinger patent was developed is divided into two parts. First, there are the designs relating to elevators and, second, the art relating to self-propelled vehicles. In the Patent Office these two fields are separated for the purpose of detailed examinations, and this seems to have clouded the thinking upon the subject when trucks and elevators were united in one frame. Plaintiff claims that lumber carriers, consisting of lifting means mounted within a straddle carrier, constitute a separate field governed by peculiar

principles and that the developments in the art of elevator or front-end carrier construction are not to be considered. Where a useful principle has been exemplified and belongs to the public domain, no monopoly can thereafter be granted as to that principle.¹ A toy may anticipate a useful industrial device. Where a machine has been invented which works in one material no monopoly can be granted simply because it has been set to work on some different material.²

The validity of the Gerlinger patent should be first then considered in relation to the construction of elevators, because the essential elements of the claim in question relate to the operation of a lifting device. Every element in this device was old in that art except the member 67, which stopped the operation of the elevator by the upward pressure of the load. Differentiation between the Gerlinger combination and any prior machine for lifting may thus be established. The prior art, as [155] the Master found, bodied forth many devices for raising loads which contained members limiting the travel to specified points by cutting off the power and applying brakes to the mechanism. It disclosed no elevator designed to stop when the load carried thereby pressed against a designated member. As-

1. See *E. I. Du Pont de Nemours & Co. vs. Glidden Co.* 1 F. Supp. 1007, 1111; *Howe Machine Company vs. National Needle Company* 134 U. S. 388, 397; *St. Germain vs. Brunswick* 135 U. S. 227, 230.

2. *Ransome Concrete Machinery Co. vs. United Concrete Machinery Co.* 177 Fed. 413.

suming utility, the mechanism was patentable, as an improvement upon the previous devices for load lifting.

The downward movement in the Gerlinger machine was stopped by an entirely different member, acting upon different principles, and not actuated by the load. By the application of purely mechanical skill, the stop on the downward movement could have been constructed, by following the designs of prior patents. This feature was therefore unpatentable alone in a lifting device. Under the specifications, Gerlinger could, as he actually did in practice, have substituted the type of stop on the downward movement for the load actuated stop of the upper movement. However, once this change was made on an elevator, the device would be unpatentable in view of the prior art.

The Gerlinger device does contain a four point independent lift, positively actuated. No differentiation can be seen between this type of lift and a platform lift in elevator construction and that art contains many exemplifications of the platform lift positively actuated. The brake upon the mechanism is also old in the art of construction of load lifting devices. These additions therefore would not render a load lifting device patentable, alone.

There must of course be conceded to a claim of a patent which has been granted, the presumption of validity. In a combination patent, where an element of novelty and supposed utility has been added to one of the constituent devices, the combination

might be patentable. Here, although the device of limiting the upward movement by action of the load positively forced upward against a bar which actuated mechanism to cut off [156] the power and apply a brake was one relating to the art of constructing elevators, it also constituted a patentable novelty in the peculiar combination of elevator and truck known as a straddle lumber carrier if utility were established. So construed the claim is valid. Upon similar principles, if the vital member which brought the mechanism to a stop were omitted the combination would not lay basis for a patent upon an elevator so designed nor would it infringe upon a machine which did contain the load stop.³ To avoid this, the contention that an elevating device mounted within a straddle carrier constitutes a distinct art, is raised. But elevators and straddle carriers were both old and well known mechanisms before the Gerlinger patents. The latter should therefore be judged as an attempted combination of such mechanisms.

All in all, an elevator is a lifting device and a truck is a carrying mechanism. The function of these mechanisms is independent and diverse. While the form of the truck must be modified to accommodate the elevator and the form of the elevator must be changed to ride upon the truck, the essential function of each respective device remains. The union upon one frame is mechanical. The gearing

3. Cimiotti Unhairing Company vs. American Fur Refining Company, 198 U. S. 399, 410.

of the respective devices to one power shaft is convenient but functionally incidental. When these devices were thus conveniently mounted together, the truck performed no new function. It carried the load and moved backward and forward. The elevator performed no new function. It lifted or lowered the load. Although geared to the same power shaft, these diverse devices did not even act simultaneously. The [157] peculiar qualities of a truck and an elevator were not amalgamated to produce a new or different function or result.⁴ A mere aggregation was attained.⁵

This is a clear case for the application of the principle of Grinnell Washing Machine Company vs. E. E. Johnson Company, 247 U. S. 426, where it was held that a gearing device applied to a washing machine whereby the operation of wringing in either direction might be conducted simultaneously with the operation of washing or separately, with one motor, was void for want of invention.

The court there say, quoting *Hailes vs. Van Wormer*, 20 Wall 353, 368:

“It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the re-

4. *Dilg, et al. vs. George Borgfeldt & Co.* 189 Fed. 588, 590; *Keene, et al. vs. New Idea Spreader Co.* 231 Fed. 701.

5. *Hemming vs. S. Kresage Co.* 24 F. Supp. 981, 983.

sults must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination."

Insofar as the elevating members were anticipated in the previous art relating to elevators, then these would be also anticipated in a lifting device carried within a straddle carrier unless a new function was performed thereby. [158]

There were various forms of carriers of different designs used for carrying lumber before the Gerlinger patents. The "straddle" type carries the load "within" the frame. Other types carry the load "upon" or "in front of" the frame. It is unquestioned that the previous art had shown exam-

ples of an elevator which had a positive means of lifting coupled with a means of limiting the movement in either direction of the load lifting devices, in carriers which transported the load either "upon" or "in front of" the frame. There is some testimony that these devices are different machines from straddle carriers. The plaintiff upon this theory disclaimed the intention of specifying a front end carrier which had all these elements, as infringement. Assuming the previous existence of a straddle carrier and of a truck supporting an elevator "in front of" its propelling mechanism, which exemplified the positive lift, the cut off of power within definite limits and the braking mechanism, it is inconceivable that invention can consist in transposing these elements so that the load is lifted "within" instead of "in front of" or "upon" the carrier.⁶

It seems too clear for argument that where the straddle type of carrier with load lifting devices "within" the frame and other carriers which had load lifting devices "upon" or "in front of" the frame, that nothing more than mechanical knowledge or skill could be required to adapt the "positive lift" and "means of limiting the movement in

6. "Position and rearrangement of parts are not invention, unless there results therefrom something more than the mere mechanical skill of the mechanic in solving problems confronting him." *Logemann Bros. Co. vs. Galland-Henning Mfg. Co.*, 100 F. 2d 557, 559.

either direction of the load lifting devices" already in use upon the other types to use upon the straddle type. [159]

In considering the patent involved, therefore, emphasis is laid upon the fact that the device as a whole is a lumber carrier in a "O" shaped frame. But such lumber carriers of the same general construction were old and were commonly designated as "straddle carriers". These had been commonly used in the trade but Gerlinger constructed a new form which was held not to infringe upon the previous devices in the form of the frame. But Gerlinger did not invent the "straddle carrier".

The field of lumber carriers is crowded by parallel invention. Even the specific field of the straddle type carriers is full. Litigation developed over this type of carrier, although the particular features here in issue were not in controversy. This is shown by the fact that Ross sued Overlin in this court upon an infringement of patent No. 1,209,209 relating to the construction of the frame of a straddle type carrier, *Ross vs. East Side Mill & Lumber Co.*, 257 F. 754, and that Overlin sued Dallas Machine & Locomotive Works (plaintiff here) alleging infringement of patent No. 1,289,529 as to the construction of the frame of a straddle lumber carrier by the devices manufactured under patent No. 1,422,958, *Overlin vs. Dallas Machine & Locomotive Works*, 297 F. 7, which is the patent at the basis of this suit. In neither of these cases was the

question of patentability of an elevator mounted on a straddle frame discussed.

Gerlinger then did not attain any end by designating his machine a "lumber carrier" when essentially it was an aggregation of such diverse devices as an elevator and a truck. But even in this limited field he was narrowly circumscribed. It is true that the other "straddle carriers" had ropes or cable lifts and were probably not as efficient as the Gerlinger device. The ropes or wires sagged when a load was carried. But [160] where in the "front end" carriers of Carr a positive platform lift was exemplified there could have been no invention in substitution of this lifting means in the straddle carrier for the rope or wire lifting devices of Ross and Overlin. As pointed out in the file wrapper of the present Gerlinger patent, the rack and pinion lift was a mechanical equivalent to the previous means. Some suggestion is made that a four point independent lift is involved. Ross and Overlin each exemplified a four point lift. The differentiation of the Gerlinger device was in the positive nature of the lifting means. As before noted, there appears no mechanical difference between a positive four point lift and a positive lift on a platform. Neither the rack and pinion nor the four point positive lift is specified in Claim 4 as an essential of the particular combination. A brake in connection with the lifting mechanism is shown in Ross, so that idea was not a new one even with relation to a straddle carrier.

Gerlinger almost immediately abandoned the load actuated limitation on the travels of the rackbars. There is testimony to the effect that it was impracticable in field operations.

Therefore the element of the combination of Gerlinger which indicated patentability is no longer used by plaintiff. Although the Grab patent contains the load actuated stop, the machines actually built or operated by defendants do not. There is no infringement of the peculiar member which gave patentability to the Gerlinger design. While as pointed out above Gerlinger had the right to use the stop shown for the downward movement upon the upward movement also, he therefore lost the peculiar combination upon which the patent was based. The machine built or operated by defendants could have been constructed by the use of mechanical skill only from the designs of the patents for front end carriers or the elevators, cited by the Master. [161]

This brings up the question of laches. It has been proven that plaintiff after the abandonment of the load actuated stop manufactured a few carriers and then turned to the exclusive manufacture of hydraulic carriers. The advertisements as to the latter carrier and the continuous output by plaintiff indicate that Gerlinger believed these were the last word in carrier construction. At any rate in a highly competitive field, the plaintiff entirely disregarded manufacture and use of the machines

which it now claims were infringements. In 1935 there were two developments. First, plaintiff went back to the manufacture of the rack and pinion carrier. Second, plaintiff heard that the defendant Willamette-Hyster expected to sue it for infringement. Thereupon, it is claimed for the first time a detailed examination of the carriers made or operated by defendants was made by the agents of plaintiff.

There are three parties concerned in a patent suit, the patentee, the alleged infringer and the public. In order to promote invention it is proper to grant a monopoly. It is, however, in the interest of the public that as much of the art as possible be released from monopolistic control. While the characteristic of the patent is such that it is possible to look up new developments, damage occurs to the public if another person is permitted over a series of years to place devices upon the market, while a patentee sits idly by and takes no action. Sufficient damage is here shown so that the doctrine of laches is applicable. While the case of *Gillons, et al. vs. Shell Co. of California*, 86 F. 2d 600, may have distinguishing features, the principle is applicable here.⁷

Whether or not there was infringement still laches is a complete bar.

7. See also *Woodmanse & Hewitt Manuf'g Co. vs. Williams, et al.* 68 Fed. 489, 492; *Window Glass Mach. Co., et al. vs. Pittsburgh Plate Glass Co.*, 284 Fed. 645, 650.

The court affirms the findings of the Master and overrules the exceptions and will enter decree dismissing the suit.

[Endorsed]: Filed February 6, 1939. [162]

And afterwards, to wit, on Friday, the 30th day of June, 1939, the same being the 98th Judicial day of the Regular March, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [178]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S EXCEPTIONS AND PROPOSED FINDINGS, AND ORDER ADOPTING MASTER'S REPORT AND SETTING FORTH SPECIFIC FINDINGS OF FACT AND CONCLUSION OF LAW.

The exceptions of plaintiff to the Report on file herein of Robert F. Maguire, Master in Chancery, and plaintiff's Proposed Findings and Conclusion having come on regularly for hearing before the court, the plaintiff being represented by Theodore J. Geisler, attorney for plaintiff, and defendants being represented by Austin F. Flegel, Jr., solicitor and counsel for defendants, and the court having heard, examined, and duly considered the oral argu-

ments of counsel for the respective parties and the briefs submitted in support of their respective positions, and the court having examined and duly considered the records, pleadings, transcript of evidence, exhibits, and Report of the Master on file herein, and having taken the matter under advisement, and being now fully advised:

It Is Now Therefore Ordered that plaintiff's exceptions, and each of them, to the Report on file herein of Robert F. Maguire, Master in Chancery, be and the same are hereby overruled and denied; it is further ordered that the Proposed Findings and Conclusion submitted by the plaintiff be and the same are hereby denied; and it is further ordered that the Report of Robert F. Maguire, Master in Chancery, appointed to take evidence and report his findings of fact, conclusions of law, and recommendations, which Report was filed herein on July 1, 1937, be and the same hereby is accepted and affirmed [179] and said Master's Report hereby is adopted in each and every respect as the findings of fact and conclusions of law of this court, and by way of setting forth specifically and separately the findings of fact and conclusions of law contained in said Master's Report, the court makes the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. That Dallas Machine & Locomotive Works, Inc., plaintiff herein, is and was at all time involved

in this suit the assignee of the entire right, title and interest in and to United States Letters Patent No. 1,457,025, issued May 29, 1923 to Carl F. Gerlinger for Lumber Carrier, and is vested with sufficient title therein to enable it to maintain this suit.

2. That by reason of its bill of particulars, plaintiff, for cause of suit, relies upon the alleged infringement of claim 4 of said Letters Patent No. 1,457,025.

3. That the machine shown and described in said Letters Patent No. 1,457,025 is a self-propelled straddle type truck having a load lifting device mounted within the frame and between the wheels, the lifting mechanism comprising rackbars and pinions creating four lifting points that lift positively and in unison and particularly adapted for hoisting, transporting, lowering and depositing lumber; having also means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction, having also means for manually moving the clutch to operative position; having also load actuating means for automatically moving the clutch into neutral position upon movement of the load to a predetermined extent in an upward direction, said load actuated means comprising in part a pivoted bar engageable by the top of the load as it is hoisted, with suitable linkage for moving the clutch into [180] neutral position and applying the

brake; having also means for automatically moving the clutch into neutral position upon movement of the load lifting means to a predetermined extent in a downward direction, comprising an adjustable set screw attached to one of the rackbars and adapted to engage and actuate a bell crank lever which in turn moves the clutch into neutral position and applies the brake; and having means for braking the transmitting means whenever the clutch is moved to a neutral position.

4. That the particular automatic means for moving the clutch to neutral position shown and described in Letters Patent No. 1,457,025 so far as limitation of upward movement is concerned, is the pivoted bar identified by the reference character 67.

5. That the patentee and plaintiff built but one machine as shown and described in said Letters Patent No. 1,457,025, having a load actuated pivoted bar for moving the clutch into neutral position and applying the brake; that this bar was operative only when a load was present upon the load lifting means, and was inoperative when the load was not sufficiently high or was so placed or of such a character as not to engage and move said bar; that thereafter the patentee and his assignee corrected defects which became obvious in actual operation by eliminating the pivoted bar and substituting therefor an element attached to one of the rackbars and adapted to engage and actuate a bell crank which in

turn moved the clutch into neutral position and applied the brake; that the mechanism actually used upon the machines in place of the pivoted bar is not found in the drawings or specification of said Letters Patent No. 1,457,025.

6. That the field in which the Gerlinger invention was developed is divided into two parts, namely, that relating to [181] elevators or lifting devices, and that relating to self-propelled vehicles or carrying devices; that except as they are disposed on or within the same frame they are entirely independent and the essential function of each respective mechanism remains unchanged; that the union upon one frame is mechanical; that the gearing of the respective devices to one power source is convenient, but functionally incidental; that when so united and mounted together, the truck performs no new function, but merely carries the load and moves forward and backward. Neither does the elevator perform any new function, but merely lifts or lowers the load as desired; that the peculiar qualities of a truck and of an elevator were not amalgamated to produce any new or different function or result.

7. That the essential elements of claim 4 of the patent in suit relate to the operation of a lifting device; that in view of the prior art relating to the construction of elevators every element in the Gerlinger device was old in that art, except the load ac-

tuated bar 67 which stopped the operation of the elevator by the upward pressure of the load; that by the application of purely mechanical skill the stop on the downward movement could have been constructed by following the teachings of prior patents; that to have substituted the type of stop on the downward movement for the load actuated stop on the upward movement would be unpatentable in view of the prior art.

8. That the machines built or operated by the defendants could have been constructed by the use of ordinary mechanical skill by the use of structures disclosed and described in prior patents relating to front end carriers or elevators. [182]

9. That in the prior art the patent to Dingee, No. 414,380, issued November 5, 1889, for Elevator, discloses a manually operated clutch by which power may be transmitted to the hoisting mechanism, and when power is thus applied, upward or downward movement is communicated to the load lifting means. Upon movement of the load lifting means to a predetermined extent in either direction, a projection on the lift engages a stop on the cable by which the clutch is automatically operated to cause the cable to move the clutch into neutral position and to simultaneously apply the brake.

10. That in the prior art the patent to Towson et al, No. 1,337,804, issued April 20, 1920, for Industrial Truck, discloses a self-propelled industrial truck having a load lifting means mounted in the

front end thereof, and disclosing automatic means for disconnecting the source of power from the hoisting mechanism and simultaneously applying the brake. Inasmuch as the truck is electrically operated, the automatic stop operates to break an electrical contact and thereby disconnect the source of power from the hoisting mechanism.

11. That in the prior art the patent to Nicholson et al, No. 1,340,458, issued May 18, 1920, for Portable Freight Stacking Elevator, discloses a front end carrier with a frame having load lifting means mounted therein, means for transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction. The machine is equipped with automatic means for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in either direction, and means for simultaneously applying a brake whenever the clutch is moved into neutral position. The only material difference in structure between that shown in Letters Patent No. 1,457,025 and the Nicholson machine is that in the latter the frame containing the load lifting means is at the front end of the carrier, whereas, in the patent in suit the load lifting means is mounted between the wheels. [183]

12. That in the prior art the patent to French et al, No. 1,360,917 issued November 30, 1920, for Elevating and Conveying Apparatus, discloses the

combination with a truck of a load lifting means mounted in a frame on the front end of the truck. The stop which actuates the clutch and throws it into neutral and causes the brake to be applied consists of a traveling nut on a threaded main shaft which engages lugs or collars which operate, by appropriate connection, to throw the clutch into neutral and apply the brake. The operation is similar to that adopted by the defendants.

13. That in the prior art the patent to Carr, No. 1,407,024, issued February 21, 1922, for Elevator Truck, discloses a self-propelled electrically operated elevator truck with a front end lift. The device does not employ a clutch, but means for making or breaking the electrical circuit connects or disconnects the source of power from the load lifting mechanism. It has an automatic brake and by virtue of certain stops the power is disconnected and the brake applied automatically at predetermined upper and lower limits of travel.

14. That in no one of the prior art patents is there shown or described automatic means for moving the clutch to neutral position which is dependent upon the presence of a load upon the load lifting means, and that only in this respect, i. e., the load actuated factor, does the means shown and described in Letters Patent No. 1,457,025 differ from the disclosures of the prior art.

15. That the carrier shown in photographs identified as defendants' exhibits 42 and 43, is a carrier

adapted to hoisting, transporting, lowering and depositing lumber. It comprises, (1) a frame; (2) load lifting means mounted therein; (3) means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or so set as to cause the load lifting means to move in either direction; (4) means for manually moving the clutch to operative position; (5) automatic means [184] for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in either direction; and (6) means for braking the transmission means whenever the clutch is moved to a neutral position.

16. That the carrier shown in photographs identified as defendants' exhibits 42 and 43 is manufactured and sold by defendant Willamette-Hyster Company, and that many of the parts thereof, comprising the automatic stop, reversing clutch and braking means, are interchangeable with those on the straddle type carrier manufactured by defendant Willamette-Hyster Company which plaintiff contends infringes claim 4 of said Letters Patent No. 1,457,025.

17. That because of the record admission by the plaintiff during the course of the trial that defendant Willamette-Hyster Company's front end carrier shown in photographs identified as defendants exhibits 42 and 43 does not constitute an infringement of claim 4 of the patent in suit, there being

verbal correspondence between the claim and the said front end carrier, it follows that the invention defined by claim 4 of the patent in suit must be restricted to the form of load actuated mechanism for moving the clutch shown and described by the patentee Carl F. Gerlinger.

18. That that which was in fact the invention of the patentee Carl F. Gerlinger was an automatic stop actuated by the load itself in upward movement, and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specification.

19. That defendants achieve cessation of the upward movement of the load lifting device irrespective of the presence of a load, and the means to control the downward movement of the load lifting device is substantially different from that shown and described in said Letters Patent No. 1,457,025. Even if it can be said that defendants' means of downward movement control is a mechanical equivalent of the means for such control disclosed in the patent in suit, [185] still infringement does not exist because defendants' device omits an essential element of Gerlinger's combination, namely, the load actuated stop governing upward movement.

20. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not utilize a load actuated means for causing cessation of the upward movement of the load lifting device.

21. That the lumber carriers in use by the defendant Clark & Wilson Lumber Company do not utilize a load actuating means for causing cessation of the upward movement of the load lifting device.

22. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not constitute an infringement of claim 4 of the patent in suit.

23. That the lumber carriers in use by defendant Clark & Wilson Lumber Company do not constitute an infringement of claim 4 of the patent in suit.

24. That the patent in suit, Letters Patent No. 1,457,025, issued May 29, 1923 on an application filed March 30, 1922, and that plaintiff's bill of complaint herein was exhibited October 3, 1935.

25. That as early as September, 1923, defendant Clark & Wilson Lumber Company purchased two Ross carriers, both of which have ever since been in constant use; that each of these carriers is a straddle type with load lifting means mounted in the frame between the wheels, the lift having four lifting points that work positively and in unison; that each carrier is equipped with a manually operated clutch which can be placed in neutral and which can be operated to move the lift in either direction; that each carrier has means which, when the lift has reached a predetermined point in upward or down-

ward movement, moves the clutch into neutral position and applies a brake to the load lifting means.

[186]

26. That the device alleged to infringe claim 4 of the patent in suit was first designed and constructed by the Willamette Iron & Steel Company in September, 1926; that the defendant Willamette-Hyster Company succeeded to the carrier business of the former in 1929; and that both companies, during their respective periods of operation, continuously manufactured and sold the alleged infringing device.

27. That the gross amount of defendant Willamette-Hyster Company's sales of the alleged infringing carrier is approximately \$2,000,000.00.

28. That the market for straddle type carriers is largely confined to saw mills and lumber yards; that the competitive field is largely occupied by Ross, defendant Willamette-Hyster Company, and plaintiff; that the competition between them is and has been keen; that at least as early as December, 1925, the Ross company advertised its carriers in the trade journals; that the machines of the defendant Willamette-Hyster Company and its predecessor, Willamette Iron & Steel Company, have been advertised in trade journals and in public use since September, 1926; that when in use these carriers travel through lumber yards and over loading platforms, and often upon the public highways; that in each type of machine the automatic stops are in plain

view and the automatic brake is likewise visible to casual inspection by anyone having occasion to visit the mill plant; that under such circumstances each competing manufacturer must have attained accurate and complete knowledge of the structure employed by the others; that the circumstances were such as to put the plaintiff upon inquiry; that if plaintiff was in fact ignorant of the alleged infringement, it failed to use reasonable diligence to inform itself of all of the facts; that there is imputed to the plaintiff accurate and complete knowledge of the structural details of the alleged infringing devices, and an awareness that said alleged infringing devices embodied and/or employed the alleged invention broadly defined by the terms of claim 4 of Letters Patent No. 1,457,025. [187]

29. That plaintiff has failed to sustain the burden of disclosing any impediment to earlier action or of showing how it could have remained ignorant of its rights for so long a period of time, or of showing that it was ignorant of the alleged infringement. It is found, therefore, that plaintiff had knowledge of the alleged infringement of defendants for more than six (6) years prior to the bringing of this suit.

30. That if defendant Clark & Wilson Lumber Company had knowledge of said Gerlinger patent No. 1,457,025, its knowledge was constructive only; that defendant Willamette-Hyster Company had knowledge of said Gerlinger patent.

31. That by its failure to give notice of infringement and failure to act, plaintiff has permitted defendant Clark & Wilson Lumber Company to expend large sums of money in the purchase of allegedly infringing machines and to use said machines constantly without objection during a period commencing over twelve (12) years prior to the bringing of this suit.

32. That by its failure to give notice of infringement and failure to act, plaintiff has permitted defendant Willamette-Hyster Company (and its predecessor in interest, Willamette Iron & Steel Company) to invest large sums of money in the development, manufacture, and distribution of its carriers, making no objection for approximately nine (9) years prior to the commencement of this suit.

33. That even if infringement existed as alleged, plaintiff is guilty of laches with relation to each of the defendants.

CONCLUSIONS OF LAW

1. That the patentee, Carl F. Gerlinger, was not the first, sole, or any inventor or discoverer of the invention defined by claim 4 of the patent in suit, but that said alleged invention, and all material and substantial parts thereof, had been put into public [188] use at dates more than two years before the said Carl F. Gerlinger filed his application for the patent in suit.

2. That the invention defined by claim 4 of the patent in suit was not novel or patentable at the

time of the alleged invention thereof by Carl F. Gerlinger, and that the subject matter of said claim and all material and substantial parts thereof had been known, used, invented and described and published in and by the following United States Letters Patent prior to the alleged invention or discovery thereof by the said Carl F. Gerlinger and for more than two years prior to the date of filing of the application for said patent:

Dingee	414,380	Nov. 5, 1889
Towson et al	1,337,804	Apr. 20, 1920
Nicholson et al	1,340,458	May 18, 1920
French et al	1,360,917	Nov. 30, 1920
Carr	1,407,124	Feb. 21, 1922

3. That because of the state of the prior art said Letters Patent No. 1,457,025 was not primary in character and cannot be accorded a construction broad enough to include all means for obtaining the desired result, but must be limited to the new means disclosed in said patent and an exceedingly narrow range of mechanical equivalents.

4. That claim 4 of the patent in suit is couched in language broad enough to cover combinations of elements found in the prior art, and that said claim 4, to be construed as valid, must be restricted to the particular form of device disclosed and described in the drawings and specification of the Gerlinger patent.

5. That claim 4 of the patent in suit is so restricted and limited by the disclosures of the prior

art that it does not cover the structure of the carriers manufactured and sold by the defendant Willamette-Hyster Company, or used by the defendant Clark & Wilson Lumber Company.

6. That the lumber carriers manufactured and sold by the defendant Willamette-Hyster Company, and/or used by the defendant Clark [189] & Wilson Lumber Company, did not differ from those disclosed and described in Letters Patent prior in time to the patent in suit.

7. That claim 4 of the said Letters Patent No. 1,457,025 defines a device consisting of several component parts or previously known elements in which each element remains unchanged in function or effect and its action is unaffected except incidentally by the union; the final result thereof being the mere adding together of the separate contributions of the various component elements rather than the production of any new or different function or result.

8. That nothing more than mechanical knowledge or skill was required to adapt the positive lift and means for limiting the movement in either direction of load lifting devices already in use upon other types of carriers to the type of carrier disclosed and described in the patent in suit.

9. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not constitute an infringement of claim 4 of the patent in suit.

10. That the lumber carriers in use by defendant Clark & Wilson Lumber Company do not constitute an infringement of claim 4 of the patent in suit.

11. That the plaintiff Dallas Machine & Locomotive Works, Inc., is guilty of laches for its long neglect to assert any right against these defendants and is barred from any recovery in this suit.

12. That the defendants are entitled to a decree dismissing plaintiff's suit.

13. That said decree should award defendants judgment for their taxable costs and disbursements herein and provide that execution issue therefor.

Dated this 30th day of June, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed June 30, 1939. [190]

And afterwards, to wit, on Friday, the 30th day of June, 1939, the same being the 98th Judicial day of the Regular March, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [191]

In the District Court of the United States for the
District of Oregon.

No. E-9581

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,

Plaintiff,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-
ration, and CLARK & WILSON LUMBER
COMPANY, a corporation,

Defendants.

FINAL DECREE

This cause, having come on to be heard at final hearing upon pleadings and proof taken and filed on behalf of both parties herein, and counsel for the respective parties having been heard, and due consideration having been had, and findings of fact and conclusions of law having been made and entered, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows:

1. That the above entitled suit be, and the same hereby is dismissed.

2. That the defendants have and recover from plaintiff Dallas Machine & Locomotive Works, Inc., the taxable costs of the defendants Willamette-Hyster Company and Clark & Wilson Lumber Company in this court, and that said defendants shall

have judgment and execution against the said plaintiff for said costs.

Dated this 30th day of June, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed June 30, 1939. [192]

And Afterwards, to wit, on the 10th day of August, 1939, there was duly Filed in said Court, a Notice of appeal, in words and figures as follows, to wit: [193]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The plaintiff, Dallas Machine & Locomotive Works, Inc., a corporation, in the above entitled cause hereby appeals from the final decree and judgment therein entered, June 30, 1939, in favor of the above named defendants, Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, and from each and every part of said decree and judgment to the Circuit Court of Appeals for the Ninth Circuit.

And the plaintiff, desiring a stay of said judgment pending said Appeal and until the final determination thereof, presents herewith its bond in the sum of Fifteen Hundred (\$1500.00) Dollars for approval by the Court.

Dated August 5th, 1939.

T. J. GEISLER

Attorney for Plaintiff

[Endorsed]: Filed August 10, 1939. [194]

And Afterwards, to wit, on the 10th day of August, 1939, there was duly Filed in said Court, a Bond on appeal, in words and figures as follows, to wit: [195]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that the undersigned Dallas Machine & Locomotive Works, Inc., a corporation of the State of Oregon, having its principal place of business at Dallas, Oregon, as principal, and V. O. Williams of Dallas, Oregon as surety, are held and firmly bound unto the above-named defendants, Willamette-Hyster Company, a corporation and Clark & Wilson Lumber Company, a corporation, in the sum of Fifteen Hundred (\$1500.00) Dollars; to be made to the defendants, and for which payment, well and truly to be paid, the undersigned bind themselves jointly and severally by these presents.

Signed and sealed this 5th day of August, 1939.

Whereas, in the District Court of the United States, for the District Court of Oregon, in a suit pending therein, entitled Dallas Machine & Loco-

motive Works, Inc., a corporation, Plaintiff, vs. Willamette-Hyster Company, a corporation and Clark & Wilson Lumber Company, a corporation, Defendants, a decree and judgment was rendered on June 30, 1939 against the plaintiff for the sum of One Thousand Two Hundred Twenty-Four and 05/100 (\$1,224.05) Dollars costs allowed the Defendants, and the Plaintiff has duly filed a Notice of Appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit with the Clerk of said District Court as provided by Rule 73 of the Federal Rules of Civil Procedure:

[196]

Now Therefore, the condition of the above obligation is such that if the plaintiff shall satisfy said decree and judgment in full together with costs and interest if for any reason the appeal is dismissed, or if the decree and judgment is affirmed also shall satisfy in full such modification of said judgment and such costs and interest as the Appellant Court may adjudge and award, then the above obligation is to be void; else said obligation is to remain in full force and virtue.

DALLAS MACHINE &

LOCOMOTIVE WORKS, INC.,

[Seal] By W. E. BALLANTYNE

Principal

Secty-Treas

V. O. WILLIAMS

Surety

United States of America

District of Oregon—ss.

I, V. O. Williams, the surety named in the foregoing Bond of Appeal, being first duly sworn, depose and say: That I am a resident of and a freeholder within said District; that I am not a counselor or attorney-at-law, nor Clerk of any Court, or Officer of any Court, and that I am worth the sum of Fifteen Hundred (\$1500.00) Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

V. O. WILLIAMS

Subscribed and sworn before me this 5 day of August, 1939.

[Seal]

DORIS FULLY

Notary Public for Oregon

My commission expires March 29, 1940. [197]

The above Supersedeas Bond of Plaintiff on appeal is hereby approved.

August 10th, 1939.

CLAUDE McCOLLOCH

United States District Judge.

[Endorsed]: Filed August 10, 1939 [198]

And Afterwards, to wit, on the 6th day of October, 1939, there was duly Filed in said Court, Appellant's Amended Designation of contents of rec-

ord on appeal, in words and figures as follows,
to wit: [199]

[Title of District Court and Cause.]

APPELLANT'S AMENDED DESIGNATION
OF WHAT SHALL BE CONTAINED IN
THE RECORD ON APPEAL.

The above named Plaintiff (Appellant), in compliance with Rule #75 of the Federal Rules of Civil Procedure, hereby designates the following portions of the record, proceedings and evidence in the above entitled cause which shall be contained in the Record on Appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit, viz:

1. The Complaint.

(Note: Exhibit A of Complaint being a copy of the Patent in Suit is omitted because this patent was introduced as plaintiff's Exhibit 2 on the trial of this case, (See Reporter's Transcript of Testimony, Page 25.)

2. Defendants' Motion for a Bill of Particulars to be furnished by plaintiff, and the Plaintiff's Response thereto.

3. Defendants' Answer to the Complaint.

4. Order Allowing Plaintiff's Motion for Bill of Particulars to be furnished by defendants.

5. Plaintiff's Motion for Bill of Particulars as allowed, and Defendants response thereto.

6. Order Allowing Plaintiff to file interrogatories to be answered by officers of defendants' Corporations.

7. Stipulation Withdrawing Defendants' Objections to Interrogatories and that Defendants Answered the same. [200]

8. Plaintiff's Interrogatories and the Defendants' Answers thereto.

9. The order of reference of the cause to the Standing Master.

10. The Master's Report.

11. The Plaintiff's Exceptions to the Master's Report.

12. Stipulation that further proceedings shall be pursuant to Federal Rules of Civil Procedure.

13. The opinion of the Court.

14. Order Overruling Plaintiff's exceptions, defendants' proposed findings;—an Order adopting Master's Report and setting forth specific findings of fact and conclusions of law.

15. Plaintiff's objections to proposed findings and conclusions of law submitted by the defendants.

16. Plaintiff's Proposed findings of fact and conclusions of law which the Court refused to allow.

17. Final Decree.

18. Plaintiff's Notice of Appeal.

19. Plaintiff's Bond on Appeal.

20. A statement of the evidence taken from the Reporter's Transcript of Evidence as filed by the Master with his report, omitting from said transcript all matter not essential to the Decision of the questions presented by the Appellees.

21. Orders extending time to file Transcript with the Appellant Court.

Copies of the papers above referred to and to be contained in the Record on Appeal are hereto attached.

Dated, October 4th, 1939.

T. J. GEISLER

Attorney for Plaintiff,

(Appellant).

Service of foregoing Amended Designation Admitted: October 6th 1939.

REYNOLDS, FLEGEL &

SMITH,

By P. A. JOSS

Attorneys for Defendants.

[Endorsed]: Filed October 6, 1939 [201]

And Afterwards, to wit, on the 18th day of October, 1939, there was duly Filed in said Court, a Stipulation to transmit the original exhibits to the Circuit Court of Appeals, in words and figures as follows, to wit: [202]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by the above-named plaintiff-Appellant, and the Defendants-Appellees, that an Order be entered in this cause in this Court, di-

recting the Clerk of this Court to transmit to the Clerk of the Court of Appeals of the Ninth Circuit at San Francisco, California, the following Original Exhibits:

List of Exhibits

(Note: The star placed before the designated Exhibit indicates that such Exhibit is to be reproduced as hereinbelow stipulated.)

*Pl'ff's. Exhi. 1—Gerlinger's Pat. No. 1,422,958, dated July 18, 1922, for Lumber Carrier.

Pl'ff's. Exhi. 1-A—Ross Patent, No. 1,209,209, dated Dec. 19, 1916, Motor Truck. (For copy of this Pat., see Defendants' Exhibit 78.)

*Pl'ff's. Exhi. 1-B—Ross Pat., No. 1,271,947, July 9, 1918, on Portable Elevator.

*Pl'ff's. Exhi. 1-C—Overlin Pat. No. 1,289,529, dated Dec. 31, 1918, on Truck.

*Pl'ff's. Exhi. 1-D—Overlin Pat. No. 1,349,292, dated Aug. 10, 1920 on Lumber Truck.

*Pl'ff's. Exhi. 2—Gerlinger's Pat. No. 1,457,025, dated May 29, 1923, on Lumber Carriers.

Note: Plaintiff's Exhi. 3 being pl'ff's. Interrogatories put to the officers of Defendants and Plaintiff's 3-A being defendants' Answer to the interrogatories are included by designated excerpts thereof in the body of the designated Record on Appeal.

*Pl'ff's. Exhi. 4—File wrapper of Gerlinger Pat. 1,422,958. [203]

*Pl'ff's. Exhi. 5—File wrapper of Pat. in suit, 1,457,025.

*Pl'ff's. Exhi. 6—Drawing of Load-lifting means and control of same embodied in Pl'ff's. Lumber Carriers, Nos. 2, 3, and 4.

Pl'ff's. Exhi. 7—Order of Shevlin-Hixon Company of September 3, 1935.

*Pl'ff's. Exhi. 8—Letter of Shevlin-Hixon Company to Pl'ff. of Sep. 11, 1935.

Pl'ff's. Exhi. 9, 10 and 11—Pencil sketches of drawings sent to Gerlinger's Pat. Atty. at Wash. from which to prepare drawings for the Pat. in suit.

*Pl'ff's. Exhi. 12—Assignment of Patent in suit to be omitted and in lieu thereof, state the following Abstract., to be included in the printed Transcript of Record on Appeal.

Assignment Carl F. Gerlinger to Dallas Machine & Locomotive Works, Inc., dated July 2, 1928.

Patents Nos. 1,422,958 date of issue July 18, 1922

1,457,025 “ “ “ May 29, 1923

1,480,257 “ “ “ Jan. 8, 1924

1,609,018 “ “ “ Nov. 30, 1926

1,618,330 “ “ “ Feb. 22, 1927

Recorded, Transfers of Patents, U. S. Patent Office, July 6, 1928, Liber N—135, Page 43.

Pl'ff's. Exhi. 13—Model of Gerlinger lumber carrier claimed by pl'ff. to illustrate Patent in suit.

*Def'nts. Exhi. 14—Gerlinger's Hydraulic Carrier Pat., 1,480,257, dated Jan. 8, 1924.

*Def'nts. Exhi. 15, 16, and 17—two sheets, 18, 19, 20, 21, 22, 23, and 24, being certain Advertisements which appeared in "The Timberman" from 1924 to 1929 of Lumber Carriers.

*Def'nts. Exhi. 25—Enlargement of drawings of Pat. in suit.

*Pl'ff's. Exhi. 26—Enlargement of Sheet 1 of Drawings of Pat. in suit.

*Pl'ff's. Exhi. 27—Enlargement of Sheet 2 of drawings of Pat. in suit.

Pl'ff's. Exhi. 28—May be omitted. [204]

Pl'ff's. Exhi. 29—Photographs of lumber carriers No. 2 and 3 built by Pl'ff.

Pl'ff's. Exhi. 30—Photograph of Pl'ff's. machine taken in 1922.

*Pl'ff's. Exhi. 31—Photograph of Lifting Mechanism from which the drawing, Pl'ff's. Exhi. 6 was made.

Pl'ff's. Exhi. 32—Service Manual of Defendant, Willamette-Hyster Company.

*Pl'ff's. Exhi. 33—Enlargement of Drawing No. 1, on Page 4 of said Manual. .

*Pl'ff's. Exhi. 34—Enlargement of Drawing No. 2, on Page 5 of said Manual.

*Pl'ff's. Exhi. 35—Photograph of Cottage Grove Machine built by Willamette-Hyster Company.

Pl'ff's. Exhi. 36—Photograph of Clutch Automatic Brake and Portions of Control included in Drawing in Pl'ff's. Exhi. 6.

Pl'ff's. Exhi. 37—A detailed sketch made by witness Dimick in explaining drawings of pat. in suit.

*Def'nts. Exhi. 38-A, 38-B, and 38-C.—Photographs of Def'nt. Clark & Wilson Co.'s 1923 Ross machine.

Note: Def'nts. Exhi. 39 and 40 withdrawn.

*Def'nts. Exhi. 41—Circular of Willamette-Hyster Co.

*Def'nts. Exhi. 42—Photograph of Willamette-Hyster Co. Front End lift truck.

*Def'nts. Exhi. 43—Another photograph of the same truck with one wheel removed.

*Def'nts. Exhi. 44-A, 44-B, and 44-C.—Photographs of pl'ff's. lumber carrier as built by plaintiff.

*Def'nts. Exhi. 45—Sheets 1 to 9 inclusive of record of the Gerlinger Lumber carrier known as RPF manufactured by pl'ff.

*Pl'ff's. Exhi. 46—3 sheets of record of sales of Pl'ff. mechanical lift carriers designated as RP.

*Pl'ff's Exhi. 47—Grab Pat. 1,838,939, Lifting Mechanism for Traversing Hoists dated Dec. 29, 1931.

*Pl'ff's. Exhi. 48—Enlargement of Fig. 5 of drawing of Grab patent. [205]

Pl'ffs. Exhi. 49 and 50 being copies of Assignments of Grab Patent to Willamette-Ersted Company are to be omitted and in lieu thereof state the following Abstract to be included in the printed Transcript of Record on Appeal.

*Abstract of Plaintiffs Exhi. 49.

Assignment of Gustav A. Grab to Willamette Iron & Steel Works, dated August 31, 1927, of Lifting Mechanism for Traversing Hoists, described in the specification executed July 2, 1927, filed July 23, 1927, Ser. No. 207,873, renewed under Ser. No. 455,927, filed May 26, 1930.

Recorded in Transfers of Patents, United States Patent Office, Nov. 30, 1931, Liber V—150—Page 661.

*Abstract of Pl'ffs. Exhi. 50.

Assignment by Willamette Iron & Steel Works to Willamette-Ersted Company, dated March 29, 1929, of Lifting Mechanism for Traversing Hoists described in specification filed July 23, 1927, Ser. No. 207,873.

Recorded in Transfers of Patents, United States Patent Office, Nov. 30, 1931, Liber V—150—Page 662.

*Pl'ffs. Exhi. 51—File wrapper of Grab pat., 1,838,939, on Dec. 29, 1931.

*Def'nts. Exhi. 52—Photo of mechanism contained in Willamette-Hyster Lumber Carrier.

*Def'nts. Exhi. 53—Two pages from Record Book kept by witness Hale.

*Def'nts. Exhi. 54—Further Records from same Book.

*Def'nts. Exhi. 55—Photograph of No. 2 Ross Carrier stop mechanism used at Clark & Wilson Lumber Company's Mill.

*Def'nts. Exhi. 56-A and 56-B—Photographs of Clark & Wilson Company's Willamette-Hyster Machine No. 1.

*Def'nts. Exhi. 57—An Assembly of one copy of each of the prior art references (patents) cited during the prosecution of the application for the patent in suit.

These Patents were as follows: [206]

*Dobson Patent, No. 557,776 dated Apr. 7, 1896 on Combined Starting & Stopping & Reversing Gear for Hoists, etc.

*Evans Pat., No. 846,837, dated Mar. 12, 1907 on Traveling Crane.

*Hatfield Pat., No. 889,678, dated June 2, 1908 on Shock Absorber for Self-Propelled Vehicles.

*Brunelle Pat., No. 1,054,900 dated Mar. 4, 1913 on Elevator.

*Clark Pat., No. 1,069,228 dated August 5, 1913, on Vehicle.

*Benton Pat., No. 1,092,088, dated Mar. 31, 1914, on Log Lifting & Hauling Machine.

*Winkley Pat., No. 1,163,799, dated Dec. 14, 1915, on Stop Mechanism.

*Hely Pat., No. 1,186,188, dated June 6, 1916, on Automatic Power Cut Off.

*Clark Pat., No. 1,200,411, dated Oct. 3, 1916, on Loading Device for Auto Trucks.

Ross Pat., No. 1,271,947, dated July 9, 1918, on Portable Elevator, being pl'ff's. Exhi. 1-B (which see)

Overlin Pat. No. 1,289,529, dated Dec. 31, 1918 on Truck. (being pl'ffs. Exhi. 1-C (which see).

*Overlin Pat., No. 1,323,719, dated Dec. 2, 1919, on Load Lifting Mechanism for Motor Trucks.

*Sproul Pat., No. 1,326,984, dated Jan. 6, 1920, on Elevator.

Carr Pat., No. 1,407,124, dated Feb. 21, 1922 on Elevator Truck, being def'nts. Exhi. 69 (which see)

Gerlinger Pat., No. 1,422,958, dated July 18, 1922, on Lumber Carrier, being Pl'ffs. Exhi. 1 (which see)

Def'nts. Exhi. 58—Enlargement of photograph of Def'nts. Exhi. 43.

*Def'nts. Exhi. 59—Patent to Dingee, 414,380, Nov. 5, 1889, Elevator.

*Def'nts. Exhi. 60—Enlargement of Drawings of said Dingee patent.

Def'nts. Exhi. 61—Model of Dingee Patent.

*Def'nts. Exhi. 62—Nicholson Pat., 1,340,458, dated May 18, 1920—Portable Freight Stacking Elevator.

*Def'nts. Exhi. 63—Enlargement of drawings of said Nicholson pat. [207]

*Def'nts. Exhi. 64—French & Pavey Pat. 1,360,917, dated Nov. 30, 1920—Elevating & Conveying Apparatus.

*Def'nts. Exhi. 65—Enlargement of drawing of said French & Pavey Patent.

*Def'nts. Exhi. 66—Towson & Cochran Pat., 1,337,804, dated Apr. 20, 1920, on Industrial Truck.

*Def'nts. Exhi. 67—Enlargement of drawings of said Towson & Cochran Patent.

*Def'nts. Exhi. 68—Cochran Pat., 1,260,145, dated Mar. 19, 1918, on Industrial Truck.

*Def'nts. Exhi. 69—Carr Pat., No. 1,407,124, dated Feb. 21, 1922 on Elevator Truck.

*Def'nts. Exhi. 70—Enlargement of Figs. 1 and 8 of drawing of said Carr Pat.

Pl'ff's. Exhi. 71—Photograph showing arrangement of Lumber Piles in a lumber yard.

Pl'ff's. Exhi. 72—Photograph showing arrangement of Lumber Piles in the lumber yard.

Pl'ff's. Exhi. 73—Photograph showing mode in which straddle-type lumber carriers pick up stacked lumber.

*Pl'ff's. Exhi. 74—Photograph showing operation of straddle-type carrier for picking up lumber.

Pl'ff's. Exhi. 75—Photograph illustrating use of straddle-type carrier for picking up pile of lumber arranged alongside of sorting chain.

Pl'ff's. Exhi. 76—First inside sheet of folder put out by Willamette-Hyster Company, entitled "America's Finest Straddle Truck".

*Def'nts. Exhi. 77—Entire folder including Pl'ff's. Exhi. 76. (Twelve copies of Def'nts. Exhib. 77 to be furnished by Def'nts. and included in the printed Transcript of Record on Appeal.)

*Def'nts. Exhi. 78—Ross Pat. 1,209,209, dated Dec. 19, 1916, Motor Truck, (being also Pl'ff's. Exhi. 1-A)

*Def'nts. Exhi. 79—Boudinot Pat., No. 537,628, dated April 16, 1895 on Wagon.

It is further stipulated that those of the above stated designated Exhibits marked (*) be reproduced on a convenient scale and be included in the printed Transcript of Record on Appeal in this Cause as prepared by the Clerk of said Circuit Court of Appeals.

Dated October 17, 1939.

T. J. GEISLER

Attorney for Plaintiff-
Appellant.

REYNOLDS, FLEGEL &
SMITH

of Attorneys for Defendants-
Appellees.

[Endorsed]: Filed October 18, 1939. [208]

And Afterwards, to wit, on Wednesday, the 18th day of October, 1939, the same being the 76th Judicial day of the Regular July, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [209]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO SEND EX-
HIBITS TO CLERK OF APPELLATE
COURT.

In accordance with the Stipulation of the parties,
Plaintiff - Appellant and Defendants - Appellees,
dated October 17th, 1939, and herein filed,

It Is Ordered, that the Clerk of this Court trans-
mit to the Clerk of the Court of Appeals of the
Ninth Circuit at San Francisco, California, the Ex-
hibits designated by the parties in said Stipulation,
together with a copy of said Stipulation.

Dated October 18th, 1939.

JAMES ALGER FEE

United States District Judge

OKEH:

T. J. GEISLER

Attorney for Plaintiff, Appellant.

REYNOLDS, FLEGEL & SMITH

of Attorneys for Defendants, Appellees.

[Endorsed]: Filed October 18, 1939. [210]

And, to wit, on the 16th day of October, 1939,
there was duly Filed in said Court, Transcript of
Testimony to be contained in the record on appeal,
in words and figures as follows, to wit: [211]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE TO BE
CONTAINED IN THE RECORD ON APPEAL.

A STATEMENT OF THE EVIDENCE AS
GIVEN BY THE REPORTER'S TRAN-
SCRIPT THEREOF, OMITTING ALL
MATTER NOT ESSENTIAL TO THE DE-
CISION OF THE QUESTIONS PRE-
SENTED BY THE APPEAL.

(TESTIMONY)

This case was tried before Robert F. Maguire, Esq., Master in Chancery, pursuant to an Order of Court, beginning Monday, November 23, 1936.

Appearances:

Theodore J. Geisler, Attorney for Plaintiff;

Austin F. Flegel, Jr., and Charles M. Fryer and
Alfred C. Aurich, Attorneys for Defendants.

Excerpts from Plaintiff's Opening Statement.

In answer to interrogatories, propounded by plaintiff to the defendant, the defendant was asked whether the device, the lumber carrier which they are manufacturing, embodied the elements of claim 4 of the patent in suit. I might mention that there is only one claim No. 4 in the patent in suit involved. In response to that the defendant, in answer to Interrogatory 4, made this reply. Interrogatory 4, as I mentioned, asked the defendants to state definitely whether they did manufacture some device

which embodied the elements of the combination set forth by Claim 4. In response to that, reading also, in the first place, the elements, now claim 4 is composed of the following elements: "A lumber carrier comprising a frame, load-lifting means mounted therein, means for transmitting motion from a source of power to the load-lifting means comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction, means for manually moving the clutch to operative position, automatic means for moving the clutch to neutral position, upon a movement of the load-lifting means to a predetermined extent in either direction, and means for braking the transmitting means whenever the clutch is moved to neutral position." [212]

Now taking up those so the court may be informed as to the issue before it, in regard to element a, a lumber carrier comprising a frame, the defendant answered that their device did have a frame. With regard to element b, lumber-lifting means mounted therein, the defendant answered that it had screw lifts supported by such frame for raising and lowering any desired load, as your Honor can perceive, an equivalent device; and with regard to element c, means for transmitting motion from a source of power to the load-lifting means comprising a clutch which can be set in neutral position or to cause the load-lifting means to move in either direction, the defendant in regard to that in its answer to the interrogatory said, "a motor to supply

power for operating the screw lifts, a power controlling device to transmit and control power from the motor to such screw lifts”.

We shall contend that the power controlling device is a clutch, and a clutch will be found in the defendant's device, which they admit by their manual, Service Manual, to be manufacturing.

With regard to element d, means for manually moving the clutch to operative position, defendant states their lumber carrier includes “a handle for manually operating such power controlling device to drive the screw lifts in either of two directions or to bring the power controlling device to neutral position so that no power from the motor is transmitted to the screw lifts”.

With regard to element e, automatic means “For moving the clutch to neutral position upon a movement of the load-lifting means to a predetermined extent in either direction, the defendant said that its device had “limit stops cooperating with the screw lifts and operable automatically and independently of any load carried by the truck to bring the power controlling device to neutral whenever the screw lifts reach predetermined upper and lower limits.” [213]

So that finally we have element f in the patent in suit, “and means for braking and transmitting means whenever the clutch is moved to neutral position.” With regard to that the defendants say that their device has “an automatic spring operated brake to hold the screw lifts and connected mechan-

ism against movement whenever the power controlling device is placed in neutral.”

The Master: As I understand it, then, the new idea in this particular patent is element f?

Mr. Geisler: Element f, yes, in this combination.

The Master: You are not making any claim in this suit as to patent covering the rest of them?

Mr. Geisler: No, Your Honor.

The Master: Just the combination of these a, b, c, d, and e plus f?

Mr. Geisler: Plus f.

The Master: Which makes the patent?

Mr. Geisler: The combination in suit, yes.

The Master: All right.

PLAINTIFF'S EVIDENCE

CARL F. GERLINGER

was produced as a witness in behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: Carl F. Gerlinger; Dallas, Oregon.

The Master: You may proceed.

Q. (By Mr. Geisler) What is your business Mr. Gerlinger?

A. I am president of the Dallas Machine & Locomotive works and Klamath Machine & Locomotive works, Klamath, Oregon.

(Testimony of Carl F. Gerlinger.)

Q. The Dallas Machine & Locomotive Works is the plaintiff here in suit? That is the person suing in this case? [214] A. Yes.

Q. When was that organized?

A. The first of December, 1919.

Q. What was your business, in other words, what experience, if any, did you have with mechanics prior to 1919?

A. I have been working in the mechanical line for forty-five years.

Q. When did you first begin that building of a lumber carrier?

The Witness: State that question again.

The Master: When did you first begin the building of a lumber carrier? A. In May, 1921.

Q. (By Mr. Geisler) What improvement did you embody in the lumber carrier, the first one that you built? I am referring to [215] your first patent.

A. I was the first to think of and to manufacture a carrier with a positive lift and automatic feature, where automatic stop moved clutch in neutral position and applied the brake.

Q. Well, the first machine and the first patent did not include a brake? A. No.

Q. Did you apply for a patent on your improvement that you first made in the lumber carrier?

A. On the first one?

Q. Yes. A. Yes.

Mr. Geisler: I offer here a certified copy of patent issued to Carl F. Gerlinger July 18th, 1922, No. 1422958 for improvement in lumber carriers.

(Testimony of Carl F. Gerlinger.)

The Master: Do you want him to identify that?

Mr. Geisler: Yes.

Q. Is that your patent? A. Yes.

Q. You are the Carl F. Gerlinger mentioned in that patent? A. Yes.

Q. Do you remember going over the case, I mean the application for patent in the Patent Office, the application which matured in this patent I have just mentioned? Do you remember going over that with your attorney? A. Yes.

Q. Do you remember that in that application certain patents were cited against you, namely, Ross, No. 1209209, dated December 19th, 1916, on motor truck; also Ross No. 1271947, dated July 9th, 1918, covering portable elevator; also Overlin No. 1289529, dated December 31, 1918, on a truck; and Overlin No. 1349942, dated August 10th, 1920, covering a lumber truck? You [216] may show those four patents to the witness. And I ask you whether you remember their citation in the course of your application for patent being prosecuted—citation by the Patent Office? A. Yes, I do.

The following patents were thereupon introduced by the plaintiff: The patent to Mr. Gerlinger No. 1,422,958, dated July 18, 1922, as Plaintiff's Exhibit #1. The patent to Ross, No. 1,209,209, of December 19, 1916 as plaintiff's Exhibit #1-A. The patent to Ross of July 9, 1918, No. 1,271,947, as Plaintiff's Exhibit #1-B. The patent to Overlin, No. 1,289,529, of December 31, 1918 as Plaintiff's Exhibit #1-C.

(Testimony of Carl F. Gerlinger.)

And the patent to Overlin, No. 1,349,292 of August 10, 1920 as Plaintiff's Exhibit #1-D.

Q. (By Mr. Geisler) Now Mr. Gerlinger, in those four patents which you have here, the two Ross and two Overlin, they have a particular kind of——

A. Lifting?

Q. Lifting mechanism. A. Oh.

Q. What kind of lifting mechanism was that?

A. The Ross and the Overlin have a cable lift.

Q. Now is a cable lift—do you consider the cable lift satisfactory?

A. No.

Q. Why not?

A. Their shoes are lowered by gravity and very often splinters get in between the shoe and guide and the cable would unwind and the shoe wouldn't lower, and in winter months where snow and ice it was practically impossible to operate them.

Q. Now what improvement upon that did you make, which is de- [217] scribed in your first patent?

A. Well, I was the first with a positive—first to think of and to manufacture with a positive lift with automatic feature.

Q. Do I understand when you say a positive lift that was something different than a cable?

A. A positive lift you have so much, just the same force up, then down, and the shoe will stay equal. For instance, if the carrier drops—maybe I make it a little plainer that way—if the carrier drops in a hole that can jerk itself out with the

(Testimony of Carl F. Gerlinger.)

power. Impossible to do it with a cable. In the winter time with condition like sliver, or snow or ice, have not no interference with a positive lift.

Q. State whether or not the positive lift that you referred to with your improvement consisted of rack bars and pinions operated by a motor.

A. My lift?

Q. That is in your first patent.

A. Yes, was of a rack bar and pinion through a worm gear and clutch.

Q. Now what else did you incorporate in your first improvement and put in that first patent with regard to a control of the load-lifting and lowering devices?

A. Automatic stops that control when the limit of travel is reached.

Q. Either up or down? A. Down.

Q. How about limit of travel up?

A. I had no up stop on the first machine. I had an up stop with a load binding, when you have to load by raising a load.

Q. Well, wasn't that—I know what he means—wasn't that the same thing?

A. The same thing, yes.

Mr. Fryer: We object to leading the witness, your Honor. [218]

The Witness: That is the same thing.

Mr. Fryer: On a point of this sort.

The Master: Sustained.

Mr. Geisler: If your Honor please, he has it here. The witness doesn't understand.

(Testimony of Carl F. Gerlinger.)

Q. I call your attention to part 67 on your first patent; I think it is 67. State whether or not you haven't some means—now I am entitled to that question—for stopping the raising of that load, controlling the raising of that load. A. Yes.

Mr. Fryer: We object to that as cross examination of his own witness, your Honor.

The Master: Overruled. Where in the patent is any 67?

Mr. Geisler: I think that is—I am mistaken as to that, your Honor. That is in Patent No. '025; it is designated w 6 in Patent No. '958.

The Witness: That is correct. That is the upper stop.

The Master: Wait a minute.

Q. (By Mr. Geisler) In Patent 1422958 explain what that part there w 6 is.

A. That is the stop with the upper movement with a load.

Q. I see. Now when did you first build a lumber carrier such as shown in your patent, Plaintiff's Exhibit 1? That is '958. A. In May, 1921.

Q. When was that carrier completed?

A. End of July, 1921.

Q. Did you operate that carrier? A. Yes.

Q. Where?

A. It was tested in the Willamette Valley Lumber Company's yard.

Q. What did you discover in that test?

(Testimony of Carl F. Gerlinger.)

A. I discovered that I needed a brake on the lifting device.

Q. Why? [219]

A. To stop the lifting device from further movement.

The Master: From what kind of movement?

Q. (By Mr. Geisler) What do you mean by further movement?

A. To stop from further movement.

Q. What direction? A. In either direction.

Q. Well, did you notice any particular difficulty?

A. When?

Q. Wait a minute. Did you notice any particular difficulty with regard to the lowering of the load as you operated the carrier?

A. Well, you had to—by lowering—I didn't get that question right, Mr. Geisler.

(Last question read.)

A. Well, it gradually released the load.

Q. What do you mean by released the load?

A. Well, the load would settle.

Q. Was the settling of the load quite perceptible?

A. Yes, it was. I mean, but the main reason, too, for the brake is for to stop the lifting device from further movement, see.

Q. Supposing you ran that carrier across the yard, the lumber yard, state whether or not you noticed any settling of the load as you traveled.

A. Oh, yes, through the vibration. Without the brake it isn't possible to operate with a positive lift.

(Testimony of Carl F. Gerlinger.)

Q. Now after you had noticed that difficulty what further did you do with the lumber carrier?

The Witness: I didn't get that.

(Last question read.)

Mr. Geisler: I mean the one that you had in the——

A. Well, I moved it back to the shop. [220]

Q. Where was this trial made? I forgot to ask you. Where did you try out that lumber carrier the way you built it first; in what particular lumber yard was that?

A. In the Willamette Valley Lumber Company.

Q. Where is that? A. At Dallas.

Q. Now what did you do with that lumber carrier after you found that it didn't work as you wanted it to?

A. Well, I rebuilt—I moved it back. The power plant wasn't satisfactory, and gear drive not satisfactory, and improvement was needed in the lifting device. Is that what you are asking?

Q. Well now, what did you do with improving the lifting and lowering devices?

A. With this machine I didn't do anything. I rebuilt this machine.

Q. Well, when you rebuilt it what changes did you make in it?

A. I changed the power plant and made improvement in the lifting device.

Q. What was the improvement in the lifting device? A. I applied the brake.

(Testimony of Carl F. Gerlinger.)

Q. When did you make that improvement—state the time approximately—including the brake mechanism? A. September, 1921.

Q. When you had that machine rebuilt, including the brake mechanism, did you make any further test with it? A. Yes.

Q. Where?

A. At the Willamette Valley Lumber Company's yard.

Q. When was that test made?

A. End of September, 1921.

Q. Was that machine,—was that lumber carrier, including the brake mechanism, operated practically after that? A. Yes. [221]

Q. By whom?

A. By the Willamette Valley Lumber Company.

Q. Did you people have a patent on your improved lumber carrier, including the brake mechanism? A. Yes.

Mr. Geisler: I now offer in evidence Patent No. 1457025, dated May 29, 1923, issued to Carl F. Gerlinger, covering lumber carriers. That is the patent here in suit. Is this the patent which you received?

A. Yes.

Mr. Geisler: I believe we will offer in evidence the interrogatories and answers to interrogatories filed by the defendant in this case, as I wish to rely upon them. Shall I make a formal offer of that at this time?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: If Your Honor please, I do not understand whether the last offer has been completed or not. I thought there was an offer being made, and I would like to get the number of it, if it has been received. I have no objection to that offer.

Mr. Geisler: Well, it just occurred to me, Mr. Fryer.

The Master: What about this patent that has been identified? Are you offering that?

Mr. Geisler: Yes, Your Honor.

The Master: All right, that will become Complainant's Exhibit 2 and it is received.

(Patent Number 1457025 referred to was thereupon received in evidence and marked Complainant's Exhibit 2.)

Mr. Geisler: Now, Your Honor, I renew my offer with regard to the answers to the interrogatories, so that they may be formally before the Court.

The Master: Is there any objection?

Mr. Fryer: No objection, Your Honor. [222]

The Master: I shall mark them as an exhibit.

The Master: Now, the answers which you are offering in evidence are the answers to the interrogatories filed on July 15, 1936?

Mr. Geisler: Yes. I presume, in order to make the record complete, we will probably have to have the interrogatories and the answers, too, otherwise they may not be—so I will offer the interrogatories and the defendant's answers. There are two. I will make copies of both.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I have no objection.

(The interrogatories and answers referred to were thereupon received in evidence and marked Complainant's Exhibits 3 and 3-A.)

Mr. Geisler: I offer in evidence the file wrapper and contents of the patent to Carl F. Gerlinger No. 1422958, dated July 18, 1922.

(Said file wrapper and contents covering patent No. 1422958 were thereupon received in evidence and marked Complainant's Exhibit 4.)

Mr. Geisler: I also offer in evidence the file wrapper in relation to patent to Carl F. Gerlinger No. 1457025, dated May 29, 1923.

(The file wrapper referred to covering patent No. 1457025 was thereupon received in evidence and marked Complainant's Exhibit 5.) [223]

Q. (By Mr. Geisler) Now, going back to the lumber carrier which you delivered to the Willamette Valley Lumber Company on October 1st, 1921, did you make or build any more lumber carriers of that same type later?

A. Yes, I started—we started to work in the first part of October in 1921 and finished two February 1st, 1922.

Q. State what if any changes you made in the lumber carriers which you built like your patent there, number——

A. I don't have that patent here.

Q. —'025. Will you give him a copy there?

(Testimony of Carl F. Gerlinger.)

The Master: '025?

Mr. Geisler: '025, yes.

The Master: The witness is given Exhibit Number 2.

A. The only change I made was mechanical only. It was improvement in the lifting device and change the control lever.

Q. The second machine had those improvements?

A. Yes.

Q. Is that right? A. Yes.

Q. Did you build any more machines like '025? I mean that patent, number 2? A. Yes.

Q. How many more shortly after this time of 1921 and 1922, how many more did you build at that time? You built one machine——

A. From when?

Q. Just around that time? You built one machine with an improvement. A. Yes.

Q. How many more did you build of that same, just around that time?

A. We built one hundred and five.

Q. Yes, but you built it—the machine which you built in 1922, was that similar to—that was the 3 machine, is that right? [224]

A. At '22, as I stated before, we finished two in February, and then we kept on building the machine the same.

Q. Now, I would like to get those machines in my mind and before the Court in order numerically. Now, the first machine, as I understand, you de-

(Testimony of Carl F. Gerlinger.)

livered to the Willamette Valley Lumber Company
October 1st, 1921? A. That is correct.

Q. Then you built, shortly after that, another
machine just like your patent here in suit but with
certain improvements?

A. With certain improvements, yes.

Q. Which you stated were mechanical changes?

A. Yes.

Q. Now, what became of that number 2 machine?

A. The number 2 machine and 3 machine was
delivered to the Cobb-Mitchell people at Valsetz,
what our record will prove.

Q. Valsetz? A. Yes.

Q. Oregon? A. Oregon.

Q. And did you build a number 4 machine?

A. Yes.

Q. What became of that? When did you build it,
too?

A. Well, our Secretary can explain that better.
He got all the records.

Q. Well, do you know approximately?

The Master: Have you a list of those machines?

Mr. Geisler: Well, the only way we can identify
them, Your Honor, would be——

The Master: No, I am not speaking about that. I
say, have you a list of them?

Mr. Geisler: Yes, we will be able to show you—
you mean in regard to time made?

The Master: The numbers and places made and
places dis- [225] posed of and the date.

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: I will have that.

The Master: I thought you had that here.

Mr. Geisler: I haven't that here, but I thought I would bring it out by the witness.

The Master: Very well.

Q. (By Mr. Geisler) Can you tell approximately, that number 4 machine?

A. To who it was sold to?

Q. Yes, when and to whom?

A. Or when it was completed?

Q. No, I would like to know to whom it was—well, when was it completed and to whom was it sold, if you can remember?

A. Well, our shop—

Q. Do you have a notation of that in your shop records?

A. Yes.

Mr. Geisler: Well, then we will pass the question until—We have the Secretary here, Your Honor.

The Master: If it is any convenience, Mr. Geisler, you can withdraw this witness and put your Secretary on and get those in and then you can proceed with your examination.

Mr. Geisler: I think I am almost finished with this witness.

The Master: Very well.

(A drawing was then placed on an easel.)

Q. (By Mr. Geisler) I would like you to look at that drawing and state what it represents?

A. That is the lifting device.

Q. Of your lumber carrier?

A. Of our first lumber carrier.

(Testimony of Carl F. Gerlinger.)

The Master: That is the present one, or the first patent? A. No.

Mr. Geisler: Of the patent in suit. [226]

A. Patent in suit.

The Master: Very well.

Q. (By Mr. Geisler) Does this show the drawing just the same as in the patent in suit?

A. No.

Q. What is this a drawing of?

A. That is a drawing—the drawing is made the same as the second and third and fourth machines.

Q. Who made that drawing?

A. Mr. Dimick, H. N. Dimick.

Q. He is here in court? A. Yes.

Q. As I understand, that represents the construction as made in the first, second and third machines, is that correct? A. Yes.

Mr. Geisler: I will have the power identified by another witness.

Q. (By Mr. Geisler) Do you know from what particular machine, the second, third or fourth—I mean lumber carrier—that particular drawing was made?

Mr. Fryer: We object to that, if Your Honor please, on the ground, first, that there is no foundation laid, and, secondly, that it is leading.

A. That is from the fourth one——

Mr. Geisler: Just a minute.

The Master: The witness has already testified that it is the second, third and fourth machines, so I don't think it becomes leading.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: He has not testified anything about who made the drawing, though, who made it and how it happens to be here.

Mr. Geisler: He stated he made it in his office, in his shop. We will call the maker later on as a witness.

The Master: Well, I think he may ask what it is supposed to represent, and then if he connects it up by the proper testi- [227] mony of the men who drew it,——

Mr. Geisler: Very well.

The Master: —or if the witness knows of his own knowledge that it is an accurate portrayal of the machine.

Mr. Geisler: I will perfect my question. Do you know of your own knowledge, Mr. Gerlinger, that this drawing is an accurate drawing of the lifting mechanism and controls the same as your second, third and fourth machines?

A. Yes, I do.

Q. How do you know it?

A. I am positive of that.

Q. Well, state the facts, how you fix that fact in your mind?

A. Well, we had one set up in our plant.

Q. You had a mechanism set up in your plant?

A. Yes.

Q. What kind of a mechanism was that?

A. The same as shown here on this drawing.

Mr. Geisler: May I offer this in evidence, so that we can refer definitely to it.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: We object to the offer, if your Honor please, on the ground that no proper foundation has been laid.

The Master: The objection will be sustained. Number 6 for identification.

(The drawing referred to was thereupon marked for identification Complainant's Exhibit 6.)

Q. (By Mr. Geisler): You spoke of a lifting mechanism and control for the same, of which this drawing was made. Where was that mechanism set up?

A. In our plant in Dallas.

Q. How did you get that mechanism?

A. Our general superintendent got it from the Lumber Company and brought it in the shop and set it up, from—actually from a carrier. [228]

Q. This mechanism was set up in your shop?

A. And from which this sketch was made.

Q. State whether or not you can positively identify that as being the lumber raising and lowering mechanism and control therefor as built in your carriers number 2, 3 and 4?

A. Absolutely.

Mr. Geisler: I renew the offer of the exhibit.

Mr. Fryer: Same objection, your Honor.

The Master: Mr. Gerlinger, have you ever checked that drawing over with the mechanism as it was actually set up in your shop?

A. Yes, I have.

The Master: Do you know it to be accurate?

A. Yes.

(Testimony of Carl F. Gerlinger.)

The Master: Does it correctly show the relation of each part to the other? A. Yes, your Honor.

The Master: It may be received.

(The drawing heretofore marked for identification Complainant's Exhibit 6 was thereupon received in evidence.)

The Master: You may proceed.

Q. (By Mr. Geisler): Now, it is stated here in the answer in this case that you knew of the building by defendants of a similar carrier six years prior to the filing of this suit. You may state whether or not that is a fact?

A. Ask me that again, please.

Mr. Geisler: Will you read it, please?

(The question was thereupon read.)

A. I know that they was building carriers, but I didn't know that they had them features on a carrier.

Q. What features are you referring to?

A. Them automatic features which is covered by my claim of 4. [229]

Q. The same as number 4?

Mr. Fryer: We object to that as leading the witness, if your Honor please. Counsel is putting words in the mouth of the witness.

The Master: Oh, I think it is objectionable as leading.

Q. (By Mr. Geisler): When did you first find that the defendants were manufacturing a carrier which embodied the claim for patent in suit?

(Testimony of Carl F. Gerlinger.)

A. September——

The Master: You speak of the defendants. Do you mean both defendants, or the defendant Willamette-Hyster Company?

Mr. Geisler: I will take the defendant Hyster Company. A. September, 1935.

Q. (By Mr. Geisler): What were the circumstances under which you made that discovery?

A. I sold two machines to Shevlin-Hixon.

Q. Where?

A. At Bend, Oregon, and after we received the requisition, a few days later we received a letter to ask us for a guarantee for infringement of patents—patent or unpatent.

The Master: For a patent or what?

A. Patent or unpatent.

Q. (By Mr. Geisler): You mean things patented or not patented, is that right?

A. Yes, patented or not patented.

Q. State whether or not that is the order you received from——

A. That is the order what we received from them.

Mr. Geisler: I offer that first. State whether or not this is the letter that you received from the Shevlin-Hixon Company with regard to those two carriers? A. That is the letter.

Mr. Geisler: I offer them in evidence.

The Master: Any objection? [230]

Mr. Fryer: We object to it on the ground, Your Honor, that it is wholly unrelated to any issue in

(Testimony of Carl F. Gerlinger.)

the suit and not competent to prove any of the issues, not connected up in any way.

Mr. Geisler: Very well, I purpose to connect them in a moment. Now, had you done business with the Shevlin-Hixon Company before?

A. Yes, we done—we sold them, many years ago, quite a few carriers and done quite a few thousand dollars' worth of business with them and we never been asked this.

Q. Well, in your transactions with the Shevlin-Hixon Company had they ever before this time asked you for a guarantee against patents?

A. No.

The Master: With regard to the offer, both offers will be rejected at this time, because the documents seem to have no relevancy to the issues in this case. If they shall hereafter be connected up, why, the question can be resubmitted.

Mr. Fryer: Pardon me, have they an identification number, Your Honor?

The Master: The order is 7 for identification; the letter is 8 for identification.

Mr. Fryer: Thank you.

(The order and letter referred to were thereupon marked for identification, respectively, Complainant's Exhibit 7 and Complainant's Exhibit 8.)

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Geisler) After you had received that letter from the Shevlin-Hixon Company demanding a guarantee against infringement upon patents what did you do?

A. I had our general superintendent investigate, and also sent for some patents of the Willamette-Hyster's.

Q. Had you—— [231]

Q. (By Mr. Geisler) About the time that you received this letter, as you stated, from Shevlin-Hixon did any rumor come to your ears that the Willamette-Hyster Company was threatening to sue you for an infringement?

Mr. Fryer: We object to that, if Your Honor please, on the ground that no foundation has been laid, that any rumor of that sort would be not material or relevant to any issues here, and that, furthermore, it would be hearsay.

The Master: Except upon the ground as to when he first learned or had reason to believe that the defendant Hyster Company was engaged in manufacturing a machine which included some of the elements of his patent.

Mr. Fryer: True, Your Honor, but the question calls for a rumor that the Willamette-Hyster Company was going to sue Mr. Gerlinger's company, which is——

The Master: Yes, I appreciate that, Mr. Fryer. The objection will be overruled.

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Geisler) What did you do—or did you answer that question? I beg your pardon.

A. No, I didn't answer it yet.

Q. Well, please answer. The stenographer will kindly repeat the question, and you answer it.

A. What was the question?

(The question was thereupon read.)

A. Our Sales Manager came back——

Q. Just answer that “yes” or “no”, whether you heard the rumor or not. Never mind the details.

A. Yes, I heard that rumor.

Q. What did you do then?

A. Well, I sent our General Superintendent, Mr. Waters, out to investigate. I couldn't understand it.

Q. Investigate what?

A. What they wanted to sue us on—and I got a copy of their patent, and after I—— [232]

Q. Copy of whose patent?

A. Of the defendant's patent, Willamette-Hyster's—and after looking over them patents and over the machine I found out they are using our features, our automatic features on our machine. That is the first time I knowed anything about it.

Q. State whether or not you knew that the machine which you examined at that time was the lumber carrier manufactured by the defendant Willamette-Hyster Company?

A. What was that question, please?

(Testimony of Carl F. Gerlinger.)

(The question was thereupon read.)

A. Yes.

Q. Then after you found that in your opinion there was an infringement by the Willamette Lumber Company—or the Willamette-Hyster Company, what did you do?

A. I took the matter up with you.

Q. When did you make this discovery that the defendant Willamette-Hyster Company was infringing upon your patent, approximately?

A. End of September.

Q. Of what year? A. 1935.

Q. And on what patent did you consider they were infringing? A. On patent 1457025.

Mr. Geisler: Now I renew the offer of those, just as a means of connecting the time and the occasion when Mr. Gerlinger here, or the plaintiff, I should say, ascertained that there was infringement by the defendant upon the patent in suit.

Mr. Fryer: We make the same objection, if your Honor please.

The Master: They may be received, merely for the purpose of fixing the date, or approximate date.

(The papers heretofore marked for identification Complainant's Exhibit 7 and Complainant's Exhibit 8 were thereupon received in evidence.) [233]

Q. (By Mr. Geisler) I show you here three drawings and ask you whether you can identify

(Testimony of Carl F. Gerlinger.)

them as having been made by the plaintiff for the purpose of applying for a patent, applying for your patent number 1457025?

A. Yes, they are the same as the patent drawing.

Q. Do you remember about when they were made?

Mr. Fryer: That is objected to, if Your Honor please, on the ground that no proper foundation has been laid, nothing has been shown to indicate that this witness has the means or knowledge to fix the date of the making of these drawings, which so far the record shows were made by the corporation.

Mr. Geisler: Well, a corporation couldn't very well make any drawings.

The Master: He may inquire of the witness how he knows those were made and when they were made.

A. Those drawings was made in December, 1921.

Q. (By Mr. Geisler) Do you know by whom they were made?

A. Yes, by—I don't remember his initials, but his name was Benton; but our shop records should show his initials, if you like to know.

Q. Under whose direction were those made?

A. What was that?

Q. Under whose direction? Did you direct those drawings to be made?

A. Under my direction, yes.

Q. For what purpose? Why did you have those made?

(Testimony of Carl F. Gerlinger.)

A. For the improvement in—or for the patent drawing.

Mr. Geisler: I will offer those three sheets in evidence. They are identical with the patent as shown, the drawing that is shown with the patent.

Mr. Fryer: We object to them on the ground that they have not been properly authenticated nor proper foundation has not been laid.

The Master: The witness testified they were made by the [234] draftsman under his direction and in the employment of the plaintiff concern. They may be received, and they will be—Mr. Geisler, will you examine these? Is this one which I am now handling the lift mechanism?

Mr. Geisler: Yes, it is the same, if Your Honor please, as shown——

The Master: Yes, but is that the lift mechanism?

Mr. Geisler: The lift mechanism, yes, sir.

The Master: All right, that will become number 9.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 9.)

The Master: And this next drawing, which is number 10, is what?

Mr. Geisler: I didn't get Your Honor's question.

The Master: And this next drawing, what is that?

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: Oh, this is also the original draft of the patent drawing on the patent in suit.

The Master: Yes, I know it, but that is what view of the machine?

Mr. Geisler: Oh, that is the same as shown by——

The Master: What view is it?

Mr. Geisler: Wait; I will give you the exact figure. It is the same as Figure 2 on sheet 2 of the patent drawing.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 10.)

The Master: And the other one——

Mr. Geisler: Will you kindly show it so that I may identify it? That is a side elevation, shown by Figure 1 of the patent drawing, on sheet 1, of the patent in suit.

The Master: All right.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 11.)

The Master: You may proceed. [235]

Q. (By Mr. Geisler): Please look at that paper and state whether that is your signature?

A. Yes, that is.

Mr. Geisler: I offer this as an assignment of the patent in suit and various other patents to the plaintiff in the case.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: No objection.

The Master: It becomes 12.

(The assignment referred to was thereupon received in evidence and marked Complainant's Exhibit 12.)

Mr. Geisler: You may take the witness.

Cross Examination

By Mr. Fryer:

Q. State whether or not the reference characters applied to the chart, Exhibit Number 6, are the same as are applied to the corresponding parts of your machine in your patent in suit?

A. Which do you refer to, Mr. Fryer?

Q. Do you know that your patent in suit is here marked Plaintiff's Exhibit 2? I ask that the witness be handed the patent in suit, Exhibit Number 2, please.

The Master: I think he has them both there.

Q. (By Mr. Fryer): I now call your attention to the large chart on the easel and ask you whether you understand that that is Exhibit Number 6?

A. Exhibit Number 6—I can't get it yet, Mr. Fryer.

Q. That is that large chart right behind you, Mr. Gerlinger.

A. Oh.

Q. Do you see Exhibit 6 marked on there? All right, now, with the understanding that the patent you have in your hand is Exhibit Number 2 and that the chart is Exhibit Number 6, will you state whether the numbers of the various parts on the

(Testimony of Carl F. Gerlinger.)

drawings of your patent, Exhibit Number 2, correspond with the drawings on the chart, Exhibit Number 6?

The Master: You mean the numbers? [236]

Mr. Fryer: The numbers on the chart.

A. Oh. Oh. They do. They do.

Q. Will you point out on the chart, Exhibit Number 6, the cam 69 of your patented construction shown in Exhibit 2?

A. 69? That don't show, number 69 on here.

Q. When you say "here" what do you mean?

The Master: On 6.

A. Oh, 6—you are referring to 6? I am referring on sheet 2 here.

The Master: I say, you don't find number 69 on this Exhibit 6?

A. No.

Q. (By Mr. Fryer) In your patent you state that a member 67 has an arm with a cam-shaped upper end 69. Can you find that arm with the cam-shaped upper end 69 in the mechanism shown on the chart, Exhibit 6?

Mr. Fryer: The portion of the specification which I refer to is page 2, lines 27, 28, 29, 30, and 31, and number 69 which I refer to is shown in Figure 2 on sheet 2 of the drawings, in plan 2. May I have the question read, may it please your Honor.

(The question referred to was thereupon read.)

A. Here is 67, and instead of having a cam there is a plate and set screws, which is only a mechanical change. There is no change from principle.

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) The part 67 on the drawing number 6, then, corresponds in every way in construction and operation with the part 67 and the part 69 in the drawings of your patent, Exhibit 2, is that right?

A. Except mechanical changes.

Q. Well, name the first of those mechanical changes you refer to. [237]

A. Well, this shows mechanical changes, as I stated before, with this plate and with those set screws instead of the cam as shown here (indicating).

Q. When you refer to "This plate" and "this set screw" in your answer you refer to the rectangular yellow member on Exhibit 6 extending beneath the horizontal arm of the red mechanism?

A. Yes.

Q. And that yellow extension on the part 67, then, in your opinion, corresponds to the cam 69 in your patent, is that right?

A. What was that question again?

(The question was thereupon read.)

A. Only a mechanical change there.

Mr. Fryer: I move to strike the answer as not responsive, if your Honor please, and ask to have the question read to the witness.

The Master: Read the question to the witness. The answer will be stricken. Just answer the question, Mr. Gerlinger.

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. Yes.

Q. (By Mr. Fryer) In the operation of the mechanism shown on Exhibit 6 the yellow member 67 functions to throw the clutch mechanism into neutral when the load in the machine rises to such a position that it strikes the part 67 and moves it up, is that right? A. That is right.

Q. Now, do I correctly understand your testimony to the effect that you built a machine having a part in it like 67 which moved upwardly to throw the clutch into neutral when the load struck the part 67?

A. The machines afterwards, you mean?

Mr. Fryer: Read the question, please.

(The question was thereupon read.)

A. We built them all, number 1 and number 2 and number 3 and [238] number 4, all the machines, the same as the drawing shows there, with the upper stop.

Q. And the member 67, and which is moved by the load in the machine, is a part which you call your limit stop? A. With the load.

Q. That is, you have an upper limit stop in the operation of the mechanism on Exhibit 6 when you have a load in it which will strike 67 and move it up—— A. Yes.

Q. ——to throw the mechanism into neutral?

A. The neutral position and set a brake, yes.

Mr. Fryer: I didn't hear that answer.

(The answer was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. Apply the brake.

Q. Your first machines, which you have called here 1, 2, 3 and 4, all had that mechanism?

A. The first machine—all had this on—I mean all had this on.

The Master: Referring to 67?

A. Referring to 67.

Q. (By Mr. Fryer) What other machines, if any, besides your machines 1, 2, 3 and 4 were made by you which had a part 67 which was moved upwardly by the load to throw the clutch into neutral?

A. What is that question again? I didn't get that.

(The question was thereupon read.)

A. All the rest of the machines of this model.

Q. How many more of this model did you make?

A. Six more.

Mr. Fryer: We have consented that Mr. Geisler might ask the witness some further questions on direct, your Honor.

The Master: All right, Mr. Geisler.

Further Direct Examination

By Mr. Geisler:

Q. You stated this morning, Mr. Gerlinger, that the patent drawings for '025, that is to say, the Plaintiff's Exhibit No. 5, was [239] made by a Mr. Benton; is that correct?

A. That was Mr. Wetteland.

Q. W-e-t-t-l-a-n-d? A. W-e-t-t-e-l-a-n-d.

Q. Where is Mr. Wetteland?

(Testimony of Carl F. Gerlinger.)

A. I tried to locate him but he used to work here in Portland for the Portland Brazing & Machine Works, but he left for the East.

Q. And you don't know where he is?

A. No.

Q. Through whom did you make application for patent on this Exhibit 5; that is your Patent 1457025, the patent in suit. Through whom did you make application for that patent?

A. Baldwin & Wright.

Q. Baldwin & Wright? A. Yes.

Q. You stated this morning that after October 1st, 1921, I believe in December of 1921, you made some changes in the hoist lifting and controlling mechanism. A. Yes.

Q. Those changes I understand are shown by this Exhibit 6? A. Yes.

Q. Please explain why the changes as shown in Exhibit 6 were not incorporated in your patent drawings as filed for the patent in suit.

A. The patent drawings were sent in before I made the changes in the second machine.

The Master: Mr. Geisler, if you are talking about changes I would like to have you ask the witness to state what changes in mechanical construction were made, so we will know what we are talking about.

Mr. Geisler: Would you kindly tell the Master.

The Witness: The only changes that was made, your Honor, is in the control levers. [240]

Q. You had better point to it by number and color, if you wish, so the Court can see it.

(Testimony of Carl F. Gerlinger.)

A. This lever 64 used to go—this lever used to be straight through, but it connects with the same lever, showing the mechanical change, and this little bell crank——

Q. You will have to give the bell crank a number.

A. This bell crank 66 was turned over to take care of the duplication of the lower stop with the upper stop, and that——

The Witness: And the duplications were changed from the patent drawing: this lower stop was duplication for the upper stop; I mean this upper stop and this lower stop.

Q. What are the numbers of the stops that you just have referred to?

A. Well, No. 91 is the upper stop and——

Q. 91?

A. 91 and 90. This when you raise up with the empty shoes, up to the end of the travel.

Q. You pointed to 91 as limiting the upper lift. Look at that again and see whether you are right.

A. This is for the up stop.

The Master: When you say “this” what do you refer to? A. This lower, 91.

The Master: What is the number of it?

A. 91, your Honor.

The Master: That controls the upward movement?

A. Upper movement empty.

The Master: All right.

A. And this controls——

(Testimony of Carl F. Gerlinger.)

The Master: What number?

A. 65 controls the downward movement. As you can see, it is just a duplication from the top to the bottom. [241]

Mr. Geisler: I have a miniature here, your Honor. I gave Mr. Fryer one, too. I happen to have this same thing in three different positions. It may be convenient for the Court to have it before him.

The Master: I should like to have it. It is not offered as an exhibit but merely as illustrative of the testimony, as I understand.

Mr. Geisler: Yes, your Honor.

The Master: Very well.

Mr. Geisler: It is just a picture of that layout—I mean a photograph.

The Master: May I make an inquiry here so I will understand?

Mr. Geisler: Certainly.

The Master: Or attempt to understand this as it goes along. Relating what is shown in the drawing with what is shown in this model, which is not as yet in evidence but which counsel used in his opening statement, referring to the——

The Witness: To this (indicating)?

The Master: No; I am referring to the red portion immediately to the right of the end of the lever. Where is that indicated upon the model?

A. It is right here.

The Master: That refers then to the crossbar, descending crossbar, at the end of the lever?

(Testimony of Carl F. Gerlinger.)

A. Yes.

The Master: Now it appears to turn toward the drum or flywheel of the machine. How is that indicated?

A. Here (witness illustrating with model).

The Master: Perhaps I have not made my inquiry clear. I am referring now to this portion of the bar. Does that continue on, or does that stop, as shown here in the drawing?

A. No. That stopped there. That is over here (indicating). [242]

The Master: That is what I am trying to get in mind.

A. That is shown here (witness indicating on model). This is the bracket right over here. It is just cut off there.

The Master: It is merely a fastening bracket?

A. Yes.

The Master: That is all I wanted to ask. I think I get it now.

Mr. Geisler: I at this time offer that model in evidence as illustrating the operation. It is not accurate, but it is illustrating the construction and operation of the claim in suit.

Mr. Fryer: We object to it, if your Honor please, upon the ground, first of all, that no foundation has been laid, and on the further ground that it is not in accordance with the drawings of the patent in suit and for that reason is misrepresentative. I think until a proper foundation is made to show

(Testimony of Carl F. Gerlinger.)

that it truly and correctly represents the machine in patent it should be excluded from the record.

The Master: On the ground that the proper foundation has not as yet been made I shall sustain the objection. I am not yet advised as to the propriety of the other objection. But it will be marked 13 for identification.

(The model was thereupon marked for identification Complainant's Exhibit 13.)

Mr. Geisler: I think that is all.

Mr. Fryer: Now if the Court please, before we proceed with our cross examination we ask that an order be entered excluding all witnesses from the court room except the witnesses representative of the parties themselves. In that connection Mr. Grab, of the Willamette-Hyster Company is the only party here on behalf of the defendants who will be a witness, and he is representative of that corporation.

Mr. Geisler: Well, all the witnesses I have here, Your Honor, [243] are Mr. Waters, who has just stepped out, and Mr. Ballantyne, and Mr. Ballantyne is a representative of the defendant corporation.

Mr. Fryer: Do I understand they are all officers or executives of the plaintiff corporation, Mr. Geisler?

Mr. Geisler: They are employed there.

Mr. Fryer: I think the exception only goes, if your Honor please, to one witness on each side who

(Testimony of Carl F. Gerlinger.)

is to represent the corporate entity, and that all other witnesses, even though employed by a corporate party, are usually included in an order excluding witnesses.

Mr. Geisler: Well, we have the secretary and treasurer here of the plaintiff corporation; we also have the general superintendent here.

Mr. Fryer: We have no objection to one representative to represent the corporate entity, but we do object to a number of them, your Honor, if they are going to be witnesses.

Mr. Flegel: I will say to the Master that none of the defendants' witnesses have been in the court room at any time during the proceedings, except Mr. Grab.

The Master: What position do you take with regard to the motion, Mr. Geisler?

Mr. Geisler: Well, I don't know. I suppose it is addressed somewhat to the discretion of the Court. If the defendant insists upon it I will have to leave it up to the determination of the Court.

The Master: Well, I know, but I want to be advised as to what your position is on the matter.

Mr. Geisler: Well, if it is ordered I will have to—if your Honor means I shall have to go back there and bring in these different witnesses one at a time I can do that.

The Master: No. I mean, do you object to the motion; and, if so, what is the ground of your objec-

(Testimony of Carl F. Gerlinger.)

tion and what modifications are agreeable to you?

[244]

Mr. Geisler: The party, Mr. Grab, who is retained here in the capacity of an officer of the corporation, —I would like to ask, in the first place, what is his official position?

Mr. Fryer: Mr. Grab is the sole individual employed by the defendant Willamette-Hyster Company, who is in charge of the carrier business of that concern. He is in direct charge of the manufacture and sale of the subject matter which is here accused of being an infringement of the patent in suit, and he, I think, is the only man in that organization having that detailed knowledge of that branch of the business.

Mr. Geisler: Mr. Grab is also the one that brought knowledge of this carrier which the defendant is now making, and the carrier from the plaintiff's shop.

The Master: I didn't get that statement, Mr. Geisler.

Mr. Geisler: Mr. Grab is also the party formerly working for the plaintiff who carried the device here in controversy from plaintiff's shop into defendant's shop and caused it to be made there; so I think he is a very interested party.

Mr. Fryer: We submit that is no reason for denying the defendants' motion, Your Honor.

The Master: Is he an officer of the defendant corporation?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: He is a managing director, but he is not a corporate officer. He is the sole man in the defendant's organization, however, who manages that branch of the business. It is a division of the Willamette-Hyster Company and Mr. Grab is in charge of that division of the corporation's business.

The Master: Of course, I shall permit the patentee to be present. I shall permit such person of the technical manufacturing force of the plaintiff to be present and one of its representatives who is such as secretary or president, as you may select. The other witnesses I will order excluded.

Mr. Geisler: Well, your Honor, the patentee is the president. [245]

The Master: You may select one other officer then of the corporation.

Mr. Geisler: I will select Mr. Ballantyne, who is its secretary. Your Honor, we have two men here; one is the superintendent of construction, Mr. Waters; he is not now present; and Mr. Dimick, who has charge of constructive work in the shop.

The Master: Which one do you wish to select?

Mr. Geisler: Well, they are both material to us. Just a minute; I will ask who is the most important. I will select Mr. Dimick then. He is the draftsman and in charge of construction there under Mr. Waters.

The Master: Very well. The Bailiff will make arrangement for the accommodation of all other

(Testimony of Carl F. Gerlinger.)

witnesses in the witness room, and all others except the patentee—and is it Mr. Waters?

Mr. Geisler: Mr. Dimick.

The Master: Mr. Dimick, and who is the other officer, Mr. Valentine? Is it Valentine or Ballantyne?

Mr. Geisler: Ballantyne.

The Master: Mr. Ballantyne may be present, and counsel may understand that whenever they desire to call or are ready to call their witnesses if they will inform the bailiff he will take the message to them.

Mr. Geisler: Thank you. Proceed, Mr. Fryer.

Cross Examination

By Mr. Fryer (Resumed):

Q. Is the part marked 91 on the chart Exhibit 6 shown in the drawings of your patent here in suit? A. No.

Q. Is there a part on the model, Exhibit 13 for identification, marked 91 and corresponding to 91 on on the chart, Exhibit 6?

The Master: Exhibit 13 is the model.

A. The model is shown the same as the drawing.

Mr. Fryer: May I have the question read again please. [246]

(Last question read.)

Q. (By Mr. Fryer) Can't you answer that question? A. I don't know what you mean.

Q. Can you find on the model, Exhibit 13, a part corresponding to the part 91 on the chart, Exhibit 6?

(Testimony of Carl F. Gerlinger.)

A. Part 91 (indicating on Exhibit 6) is right down here (indicating on Exhibit 13 for identification).

Q. Well then, what is your answer to the question?

A. The part on the model is the same as on 91.

Q. Your answer then is that both the model, Exhibit 13, and the structure shown on the chart, Exhibit 6, have a part marked 91; is that right?

A. Yes.

Q. And your patent here in suit does not show that part 91; is that right?

A. That is right. I mean the patent drawing don't show it.

Q. You mean the drawings of your patent here in suit do not show the part 91?

A. 91, no. It is just simply duplication from the top.

Mr. Fryer: Just a minute. I move to strike the voluntary statement of the witness, if your Honor please.

The Master: No. I think it is a proper explanation.

Mr. Fryer: It is an expression of a conclusion, as I think. It started out to be, your Honor.

The Master: Let's have what was said read.

(Last answer of the witness read.)

Mr. Fryer: Now read the question, please, Mr. Reporter.

(Last question read.)

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I will put it another way.

Q. Neither the drawings nor the descriptions of your patent here in suit show or describe a part like the part 91 on Exhibit 6; is that correct?

A. I think that is described in the patent. [247]

Q. All right. Will you point out in patent Exhibit 2 where the specification describes the part 91 shown on the chart 6.

A. I don't—

Q. Have you got the patent there?

A. It don't describe by number, no.

Q. Well, does it describe it in any other way than by number?

Mr. Geisler: You mean, Mr. Fryer, specifically—

Mr. Fryer: Just a minute, please. I object to having the cross examination interrupted by interrogation of counsel.

Mr. Geisler: I think it is fair to the witness. When you speak of a patent you take into consideration everything, the claims—

Mr. Fryer: We object to coaching the witness, if your Honor please, by the statement of counsel.

The Master: I don't think that is coaching.

Mr. Geisler: The patent should be read as a whole, your Honor, and I think the question should be put, Does he find specifically those parts, or those specific parts in the specifications and drawings?

The Master: I can't control the method of cross examination.

Mr. Geisler: No. I then object to the question as misleading to the witness.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May I have the question read, if your Honor please?

(Last question read.)

The Master: The question is perfectly fair. Objection overruled.

The Witness: What is the question?

(Last question re-read.)

A. Yes.

Q. (By Mr. Fryer) Are you referring now to the specification, the description or the claims?

A. The specification.

Q. At what page and line? [248]

A. On page 1 and—just let me look through here. Well, the claim on the first page, which states—

Q. What line, please?

A. 20, "Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake mechanism."

Q. Do you find any other place in the description of the mechanism shown in the drawings wherein the part 91 shown on Exhibit 6 is described in your patent?

A. You will have to let me read that through. (Witness peruses patent.) The only thing I see so far, I find, "Other details may be varied in form and location, and in general the invention is intended to be limited only by the scope of the appended claims."

(Testimony of Carl F. Gerlinger.)

The Master: Where are you reading from, Mr. Gerlinger?

A. From the description.

The Master: Yes, what line, what page?

A. Seventy-five.

The Master: On the first page?

A. On the second page. Yes, second.

Q. (By Mr. Fryer) All right, now, will you point out the words which you find in the patent, or the parts which you find in the drawings of your patent, which show that the machine of your patent has a part 91 which when it moves upwardly strikes the bell crank lever and throws the clutch to neutral? A. Give me that statement again.

(The question was thereupon read.)

A. The patent don't describe—it describes it, but the patent drawings don't show it. As I stated before, this change was made after the patent drawing was sent in, and that is just a duplication of this.

The Master: When you say “that is a duplication of this” it doesn't get into the record. When you speak of “that” what [249] are you referring to on this drawing 6? You say “that is a duplication of this”. Now, which is “that”—

A. 65 is a duplication of 91—I mean 91 is a duplication of 65. That is correct.

The Master: Now, when you say it is a duplication of it, in actual operation why is it a duplication?

A. This controls the downward stop and this controls the upward stop (indicating).

(Testimony of Carl F. Gerlinger.)

The Master: And why is it a duplication?

A. Well, you see, it has the same function.

The Master: Well, one controls the function of an operation in one direction and one in the other?

A. Yes.

The Master: Could you eliminate number 91 and get the same result?

A. Well, you could eliminate 91. It is not so important as the 65.

Q. (By Mr. Fryer) In one of your preceding answers you said these drawings were sent out before, or were sent at an earlier date. What did you mean by that?

A. Well, the drawings were sent in January—the patent drawing was sent in in January, and then——

Q. January of what year? A. 1922.

Q. When you say patent drawings do you mean your signed application for the patent here in suit?

A. Yes, the patent on that—the patent in suit.

Q. When did you sign your application for the patent here in suit, before or after you sent in the drawings you refer to?

A. Before I made the change.

Q. All right, now, let's get this straight. As I understand your testimony, you prepared your application for the patent here in suit and forwarded it to your attorneys, Baldwin & [250] White, in Washington? A. Yes.

Q. And then after that you made the change by which you incorporated 91 in the mechanism, is that right?

(Testimony of Carl F. Gerlinger.)

A. In the second machine, yes, that is right.

Q. So that the drawings and the description as you prepared it and sent it to Baldwin & White did not show the part 91 of Exhibit 6, is that true?

A. That is true.

Q. Now, in those drawings as you sent them to Baldwin & White to file in the Patent Office the only part which functioned to stop the load-lifting means in the upward direction was the part 67, is that right? A. 67.

Q. Is your answer yes? A. With the load.

Q. Now, let me get a direct answer, Mr. Gerlinger. The question is this: In the drawings which you sent to Baldwin & White for filing for the application for your patent here in suit, the only part which stopped the upward movement of the load-lifting means is the part 67 in the drawings of that patent, is that right?

A. That is right. As—the description, I mean, will show it here.

Mr. Fryer: I move to strike the volunteered statement of the witness, your Honor.

The Master: Overruled.

Mr. Fryer: May I have the last question read, please, and the last answer, please?

(The last question and the answer thereto were thereupon read.)

Q. (By Mr. Fryer) And in those drawings as you sent them to Baldwin & White and as they are contained in your patent in suit the part 67 func-

(Testimony of Carl F. Gerlinger.)

tions to put the clutch in neutral only [251] when the load in the machine pushes that part 67 upwardly, is that right? A. That is right.

Q. As I understand your previous testimony, you made about ten machines in which there was contained a bar or member like 67 which put the clutch in neutral only when the load of lumber struck that bar, is that right?

A. That is right.

Q. I think the last one of those machines that was made by you or your company was made about in 1922, is that correct?

A. I wouldn't say that is correct, but the record would show.

Q. What record do you refer to?

A. Corporation records.

Q. Have you any recollection of your own on that subject? A. I would say '23.

Q. About in 1922 or '23?

A. '23. I mean we made—we built similar—I mean—you have reference to this bar? You have reference to this bar?

Q. The question was directed to when you last made or sold a machine containing a bar like the bar 67 of your patent which put the clutch in neutral when the load in the machine struck that bar, and I want to know when, about, you made the last machine of that kind? A. About '23.

Q. And after that time your company, the plaintiff here, put on the market a hydraulically operated

(Testimony of Carl F. Gerlinger.)

carrier instead of a machine with the bar 67 in it, is that right? A. That is right.

Q. And after your company had developed this hydraulically operated carrier which it put out in '22 or '23 it manufactured and sold that type exclusively for some years, is that right?

A. Yes. [252]

Q. Now, do you remember about how long that was that you made and sold that hydraulic machine—and by you I mean your company?

A. Up to about '28, 1928.

Q. I think you took out some patents on some of the features in that hydraulic machine, didn't you?

A. Yes. Yes.

Q. Do you think you could recognize any of those patents that you took out on that hydraulic machine? A. Yes.

Q. Made and sold by the Dallas Machine & Locomotive Works? A. Yes.

Q. I show you a copy of Patent Number 1480257, issued in January of 1924, and ask you to state whether or not that is one of the patents which you obtained on the hydraulic machine of the Dallas Machine & Locomotive Works?

A. That is right. That is correct.

Mr. Fryer: May I have marked for identification the Gerlinger patent Number 1480257 just identified by the witness? That will be Exhibit Number 14 for identification?

(Testimony of Carl F. Gerlinger.)

The Master: 14 for identification?

(Patent Number 1480257 referred to was thereupon marked for identification Respondents' Exhibit 14.)

Q. (By Mr. Fryer) Now, those hydraulically operated machines manufactured by Dallas Machine & Locomotive Works from 1922 or '23 until 1928 had no automatic limit stops to automatically stop movement of the load-lifting device at pre-determined upper and lower limits, did they?

A. They sure had.

Q. You didn't say anything in these patents which you took out which was not true concerning these hydraulic elevators, did you? A. Huh?

(The question was thereupon read.) [253]

A. No, I did not.

Q. Would you say, then, that it is a false statement in the patent Exhibit 14 for identification where it states that the hydraulic machine there shown had no automatic upper or lower limit stops?

A. I wouldn't say that that is a false statement, no.

Q. That statement was probably true, wasn't it?

A. That is true.

Q. Did the hydraulic machine which was put out by the Dallas Machine & Locomotive Works from 1922 or '3 to 1928 have a brake on the power-transmitting means automatically applied upon the operation of an automatic limit stop?

A. I couldn't answer—I couldn't answer that question. I don't remember.

(Testimony of Carl F. Gerlinger.)

Q. You don't remember that point?

A. No.

Q. How many of these hydraulically operated carriers did Dallas Machine & Locomotive Works make between 1922 or '3 and 1928?

A. Our secretary-treasurer can answer that better. I don't remember.

Q. Have you no recollection?

A. Well, I didn't check the number.

Q. Have you no recollection whatever of the approximate number?

A. I recollect how many we built with rack and pinion type, but not with hydraulic.

Q. Do you remember whether or not you made one a year during those years?

A. Oh, no, no; we made quite a few, but I don't remember the number. As I say, our Secretary-Treasurer can give you that better than I can.

Q. Well, I just want it roughly, Mr. Gerlinger. Was it as many as a hundred a year that you made of the hydraulic machines from '22 or '23 to '28?

A. Oh, not a hundred a year, no; I wouldn't say—my estimate, total about one hundred forty to one hundred fifty. [254]

Q. All told?

A. I mean in the hydraulic.

Q. Yes.

A. We had 105 with the rack and pinion.

Q. Did you have anything to do with the manufacture or the sale of these hydraulic machines on which you took out patents?

(Testimony of Carl F. Gerlinger.)

A. You bet I had!

Q. Did you consider the presence or absence of a brake or hoisting mechanism on those hydraulic machines as a matter of any importance at all?

A. On the hydraulic? What is the question, please?

Mr. Fryer: Will you read it, please?

A. What was this question?

(The question was thereupon read.)

A. Yes. Yes, it is. I considered them very important, on the hoist.

Q. To the best of your recollection today, though, there was no brake automatically applied in those hydraulic elevators to the hoisting mechanism whenever the operation of the load-lifting means was terminated, is that right?

A. Give me that question again.

(The question was thereupon read.)

A. That is right.

Mr. Fryer: If the Court please, may I have the patent Exhibit 14 for identification for just a moment? With respect to the hydraulic carriers which your company put out between 1922 or '3 and 1928, it was true that the mechanism was such that automatic stops and holding mechanism are thereby dispensed with, is that right?

A. Well, automatic—you mean the governor is entirely from automatic stop.

Mr. Fryer: I move to strike the answer, if your Honor please, [255] on the ground that it is not re-

(Testimony of Carl F. Gerlinger.)

sponsive. I think the defendants are entitled to a direct "yes" or "no" answer, with whatever explanation the witness wishes to make.

The Master: I think so. Read the question to the witness. The witness will please answer the question as put.

(The question was then read.)

A. I wouldn't call it automatic stops. It is entirely different. Hydraulic is entirely different from a mechanical standpoint.

Q. (By Mr. Fryer) Can't you answer that question "yes" or "no" and then make an explanation? A. No.

Q. You can't answer it?

A. No, I can't answer you that way.

Q. All right, I will ask another question: In your patent Exhibit 14 for identification, in which you were describing the hydraulic carriers of your company, will you state whether or not what I am about to read to you from that patent was a true or a false description of the mechanism of those carriers: "Automatic stops and holding mechanism are thereby dispensed with, since when the lifting shoes are moved to one extreme position the pressure will be held uniform and thereby hold them in said position until the control valve is turned to release the pressure and move the pistons in the opposite direction." Now, was that a true or an untrue statement concerning the operation——

A. That is a true statement——

(Testimony of Carl F. Gerlinger.)

Q. Wait a minute; just let me finish my question. Was that a true or an untrue statement with respect to the operation of the hydraulic carriers put out by your company from 1923 to '28?

A. That is a true statement, but——

Q. Those hydraulic machines put out by your company during the years I have referred to were considered by your company superior machines to the machines first built by you having the construction and operation shown in your patent in suit; that is true, is it?

A. That didn't prove it so.

Mr. Fryer: May I have that answer, please?

(The answer was thereupon read.)

A. No, that didn't prove it so, while we came back to the same machine again later.

Mr. Fryer: May I have the question and answer, if your Honor please?

The Master: Read the question and answer.

(The question and the answer thereto were thereupon read.)

Mr. Fryer: I move to strike the answer as not responsive. The question is in the past tense, as to what was then considered, your Honor.

The Master: What you are trying to find out from the witness, isn't it, Mr. Fryer, was whether or not during the period they were putting out the hydraulic machines they considered them to be superior to the old mechanical type?

Mr. Fryer: Yes, your Honor.

(Testimony of Carl F. Gerlinger.)

The Master: During the time you were putting out the hydraulic machines did you consider the hydraulics a superior device to that of the old mechanical pinion device?

A. At that time, yes.

The Master: Now, then, if you have any explanation to make you may make it.

Q. (By Mr. Fryer) As a matter of fact, you informed your trade in carriers during that period of time that the hydraulic load-lift principle of your carriers had marked a new turn in carrier operation, is that correct? A. Yes.

Q. One of the reasons that you advanced to your trade for that statement concerning your hydraulic carriers was that the hydraulic [257] carrier had no couplings, knuckles, cables or screws to break nor gears to strip, such as machines shown in your patent, is that right? A. That is right.

Q. You advertised those hydraulic carriers of yours extensively in various ways, didn't you, Mr. Gerlinger? A. Not very extensively, no.

Q. You published advertisements in such trade journals as *The Timberman*, did you?

A. Yes.

Mr. Fryer: If your Honor please, may I ask that the witness be instructed to wait until I finish the question before he answers, as it is hard for the reporter to hear the answer when he interrupts?

The Master: Yes, Mr. Gerlinger, wait until he completes his question before you answer.

A. All right.

(Testimony of Carl F. Gerlinger.)

The Master: Because it is hard for the reporter to get both of you when you are talking at the same time. All right, read the question.

(The question and the answer thereto were thereupon read.)

Q. (By Mr. Fryer) Your company was a subscriber to The Timberman practically throughout the period of time that it manufactured and sold lumber carriers or elevators, is that true?

A. I don't get that question.

(The question was thereupon read.)

A. The elevators? That is something new to me.

Mr. Fryer: I move to strike the answer, if your Honor please. A. That is not true.

Mr. Fryer: Ask to have the question read to the witness.

The Master: The motion will be overruled, but you may read the question to the witness, and I will ask him to listen care- [258] fully and make an answer to the question.

(The question was again read.)

A. That is not true.

Q. (By Mr. Fryer) You mean that you did not subscribe to The Timberman at any time?

A. That is true.

Q. You subscribed to The Timberman practically throughout the period of time that your company manufactured and sold these machines for elevating and carrying lumber, is that right?

A. Yes, that is right.

Q. I suppose you read the various issues of The Timberman to see that your ad was properly con-

(Testimony of Carl F. Gerlinger.)

tained therein whenever you put in an advertisement of your carrier?

A. Well, I usually leave that up to the advertising man.

Q. You yourself never checked any of your advertisements which were put in *The Timberman*, did you? A. Quite often.

Q. When you did that did you do it by looking at the particular issue of *The Timber* in question?

A. I didn't quite get that.

(The question was thereupon read.)

A. Naturally I would.

Q. And you were not the only one who was advertising carriers in *The Timberman*, were you? Did some of your competitors advertise in there also? A. Yes.

Q. One of those competitors was the Ross Carrier Company of Benton Harbor, Michigan, is that true? A. That is true.

Q. I show you the October, 1926 issue of *The Timberman* and call your attention to the advertisement appearing on page 65 over the name "Dallas Machine & Locomotive Works, Dallas, Oregon", and ask you to state if that is one of the advertisements of [259] the hydraulic lumber carrier which you have stated was made by your company?

A. That is right.

Mr. Fryer: Now, if your Honor please, maybe it will shorten the procedure if the usual——

A. Ordinarily—wait a minute——

Mr. Fryer: Just a moment, Mr. Gerlinger,——

(Testimony of Carl F. Gerlinger.)

The Master: Just a moment. Wait until we hear from counsel, then you may make any inquiry. Go ahead, Mr. Fryer.

Mr. Fryer: I was about to suggest that it might shorten the hearing if instead of following the usual procedure we may be able to offer these exhibits out of order on cross examination of the other side. If not, I should like to have them marked for identification and offer them later.

The Master: Well, unless there is objection on the part of the other side you may proceed in that manner. Do you object to that method?

Mr. Geisler: No, your Honor. In listening to this matter I can't see the effect of direct examination, it isn't proper cross examination, but I am willing to let it all go in so that your Honor may be fully informed. I have no objection.

The Master: All right, it may be understood, then, that either party may offer exhibits on cross examination.

Mr. Fryer: That being the case, I will now offer in evidence the exhibit marked for identification as number 14, being patent number 1480257.

The Master: Is there objection to that Exhibit?

Mr. Geisler: Well, I imagine it will go in as the defendants' exhibits, not as ours.

The Master: Oh, yes, they will go as defendants' exhibits. Whoever offers the exhibit, it will go in as that party's exhibit.

Mr. Geisler: Yes, your Honor. Very well, no objection. [260]

(Testimony of Carl F. Gerlinger.)

The Master: Very well, it may be received as Exhibit 14.

(Said patent number 1480257, heretofore marked for identification Respondents' Exhibit 14 was thereupon received in evidence.)

The Master: Now, Mr. Gerlinger, you had some comment to make or question to ask and I had to interrupt you. I would be glad to have you proceed now.

A. What I wanted to try to say, your Honor, that this advertisement, I wouldn't state if the Dallas Machine & Locomotive Works put that advertisement in or our agent. We had a distributor them days. That is why I made the statement that we did, but I am not sure of that.

Q. (By Mr. Fryer) Is it your testimony, then, that you don't know whether or not the advertisement at page 65 of the October, 1926 Timberman is a proper advertisement of your hydraulic carrier?

A. No, I mean on that particular one I am not.

Mr. Fryer: In view of the witness's statement, your Honor, we merely mark for identification, then, the advertisement, because he seems to have some doubt about it, and ask that it be marked—

The Master: It will become Respondent's Exhibit 15 for identification.

(Page 65 of The Timberman for October, 1926 was then marked for identification Respondents' Exhibit 15.)

(Testimony of Carl F. Gerlinger.)

The Master: Do you desire it returned to you, Mr. Fryer?

Mr. Fryer: I think probably——

The Master: Do you desire it returned to you, at this time?

Mr. Fryer: No, thank you; it may be there for the time being.

The Master: All right, proceed. [261]

Q. (By Mr. Fryer) In presenting your hydraulic carrier to the trade you also emphasized that such hydraulic carriers revolutionized lumber carriers and were superior to the old-fashioned mechanical chain- or screw-lift type of carrier, is that right? A. That is right.

Q. One of the advertisements in which that feature was brought out is shown at page 113 of the November, 1926 issue of *The Timberman*, which I now show you, is that true?

The Master: 1926?

Mr. Fryer: Yes, your Honor.

A. I answer the question the same that I did before.

Q. What do you mean by the same as you did before?

A. That was—that ad was put in by our agent.

Q. When you refer to your agent you mean Gerlinger-Stevens Engineering Company?

A. Yes.

Q. Who was the Gerlinger named in that company, the Gerlinger-Stevens Engineering Company?

(Testimony of Carl F. Gerlinger.)

A. Well, there was no Gerlinger connected with it. We only used the name Gerlinger on account of the Gerlinger carrier.

Q. That was an organization in Portland, Oregon selling Gerlinger carriers, is that right?

A. Yes, that is right.

Q. You have no quarrel, have you, with the assertions made in that advertisement concerning your hydraulic carrier at that time, have you?

A. No.

Mr. Fryer: We ask to have it marked for identification, page 113 of the November, 1926 issue of *The Timberman*, as Defendants' Exhibit 16.

The Master: It becomes 16. It is marked for identification?

Mr. Fryer: Yes, your Honor. [262]

The Master: Very well.

(Said page 113 of *The Timberman*, issue of November, 1926, was thereupon marked for identification Respondents' Exhibit 16.)

Q. (By Mr. Fryer) I now show you pages 216 and 217 of the same issue of *The Timberman* for November of 1926, and ask you to state whether that is one of the advertisements of one of your competitors, the Ross Carrier Company, which you have referred to a moment ago, showing the Ross carrier which you have stated——

A. That is a Ross carrier, the latest model.

Mr. Fryer: I now wish to have marked for identification as Defendants' Exhibit 17 pages 216 and

(Testimony of Carl F. Gerlinger.)

217 of the November, 1926 issue of *The Timberman*.

The Master: 216 and 217 become Respondents' 17 for identification.

(Said pages 216 and 217 of *The Timberman*, issue of November, 1926, were thereupon marked for identification Respondents' Exhibit 17.)

Q. (By Mr. Fryer) Next I show you page 207 of the May, 1926 issue of *The Timberman*, appearing over the name of Dallas Machine & Locomotive Works, and ask you whether that is an advertisement of the Gerlinger hydraulic carrier which you have referred to? A. That is right.

Q. That was one put out by the plaintiff in this case, Dallas Machine & Locomotive Works?

A. Yes.

Mr. Fryer: We now offer in evidence page 207 of the May, 1926 issue of *The Timberman*, if your Honor please.

The Master: Any objection? Have you seen it?

Mr. Geisler: No, I haven't, but then I—this is a copy, is it? I might ask for information from counsel what the pur- [263] pose of all this evidence relative to hydraulic lifts or hydraulic lumber carriers is, as it is not, certainly, cross examination of anything that the plaintiff has introduced here.

Mr. Fryer: If your Honor please, we have a very good answer to that question but we can't make it here without defeating the purpose of the cross examination, and under those circumstances we ask leave to connect up this subject matter with the issues in the case later on.

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: In that case, your Honor,—

The Master: I don't think I shall let the matter go at large, but I shall permit you to finish the cross examination of this witness upon that subject before answering the inquiry.

Mr. Fryer: I shall be very glad to do that, your Honor, but it would completely defeat the purpose of cross examination to answer in any detail Mr. Geisler's question.

The Master: Well, I appreciate that situation sometimes arises, so I will permit the cross examination, but when the witness is excused then I shall ask counsel to answer your inquiry and you may then make appropriate motions with regard to this testimony.

Mr. Geisler: Yes. I reserve, then, the right to move to strike out all the testimony.

The Master: It will be reserved to you.

Mr. Fryer: This offer having been one to go in evidence and not merely one for identification, we ask at this time to substitute a photostatic copy for the original, in order that the original may be returned.

The Master: That may be done. Number 18.

(Said page 207 of *The Timberman*, issue of May, 1926, was thereupon received in evidence, and a photostatic copy thereof substituted for the original and marked Respondents' Exhibit 18.) [264]

Q. (By Mr. Fryer) I now show you the June, 1925 issue, or a copy of the June, 1925 issue, of

(Testimony of Carl F. Gerlinger.)

The Timberman, and particularly the advertisement appearing at page 217 over the name of Dallas Machine & Locomotive Works, and ask you to state whether that is one of your advertisements of your hydraulic lift? A. That is correct.

Mr. Fryer: We now offer in evidence page 217 of the June, 1925 issue of The Timberman and ask that it be marked Defendants' Exhibit 19.

The Master: Any objection to the receipt of this in evidence?

Mr. Geisler: Subject to my reservation, your Honor.

The Master: Subject to your reservation.

Mr. Fryer: And likewise we ask leave to substitute for that original, if the Court please a photostatic copy of that exhibit.

The Master: That will be the order.

(Said page 217 of The Timberman, issue of June, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted and marked Respondents' Exhibit 19.)

Q. (By Mr. Fryer) Now, in the Gerlinger hydraulic carrier put out in June of 1925 were there any exclusive Gerlinger features which gave those hydraulic carriers the remarkable performance described in that advertisement?

Mr. Geisler: I shall object to that question, your Honor. I don't think it has the slightest thing to do with this case.

(Testimony of Carl F. Gerlinger.)

The Master: Well, unless counsel can show some materiality to that question I shall sustain the objection. What do you claim for it? Merely the question of whether they are making extravagant claims in advertising?

Mr. Fryer: No, your Honor, it has a very definite and specific purpose, and my answer is still the same. I beg your indulgence for the time being.

The Master: Very well, I shall permit the question to be [265] put, reserving to counsel the right to move to strike. Will you read the question to the witness, and he will please answer it.

(The question was thereupon read.)

A. It sure was, for a carrier.

Q. (By Mr. Fryer) Will you name the first of those exclusive features in that hydraulic carrier which gave it that performance you there advertise?

Mr. Geisler: Pardon me, all this continuing examination will be subject to the final ruling.

The Master: I think I shall excuse the witness and ask him to retire to the witness room, so that—and I will hear counsel on that. You may step aside, Mr. Gerlinger.

Mr. Fryer: The character of this examination as cross examination is established by the fact that this witness on direct stated that he first had knowledge of the construction here complained of as an infringement just a few months before the filing of the bill of complaint. In other words, he anticipated

our defense of laches. All of this evidence is directed to the defense of laches as one of the points in connection with the defense. * * * Furthermore, the evidence is material to show that the patentee himself has abandoned and discontinued the manufacture of a machine containing the characteristic features of the drawings of this patent in suit, and that goes to the merit of the invention and the scope which should be accorded to it, and for that reason the defendants are satisfied that the evidence being brought out on this cross examination is material and necessary to their cause.

* * * * *

With respect to the Ross carrier advertisement which counsel refers to, the purpose of this examination with respect to these publications is for still another objective. There are two defendants in this case. The defendant Clark and Wilson Lumber Company is a large user of lumber carriers, and it uses two different [266] kinds of lumber carriers, one made by the Ross Carrier Company and one made by the other defendant in this case, the Willamette-Hyster Company. One of those Ross carriers, or two of them, it has used ever since 1923, and we will show in the evidence to come that that construction is substantially identical with the construction of the Willamette-Hyster Company charged to be an infringement. The cross examination here is developing the fact that this witness had, or must have had knowledge of that construction

which infringes if ours does ever since he looked at these publications away back in that early day, and it is material and necessary to prove the knowledge on the part of this witness which he now disclaims, so it would be a serious deprivation of the rights of the defendant to be prevented from going into these matters with this witness, which is largely the way, their only way, of proving it.

The Master: * * * Well, I will permit you to offer testimony which may tend to prove knowledge prior to September, 1935 of the existence, not of the Ross carrier but of the Willamette-Hyster's carrier. That will be the ruling. I may say, however, that the practice is before the Master that you may take the testimony over the Master's ruling.

Mr. Fryer: That is pursuant to Rule 46, if the Court please?

The Master: Yes.

Mr. Fryer: And then may I have the Court's instructions as to whether or not we are to enter exceptions to the Court's ruling here, in view of the rather unusual wording of the last paragraph of the Order of Reference? The practice with which I am familiar requires the party to note an exception upon a ruling of that character under Rule 46, and unless advised to the contrary by the Court I shall follow that practice and note an exception.

The Master: The practice in this district since I have been Master has been to provide at the beginning of the case that any party objecting or moving

to question or testimony is allowed the [267] exception as a matter of course, and that will be the order here unless counsel desire the strict rule followed.

Mr. Fryer: That is quite satisfactory to us, your Honor.

The Master: Is that satisfactory to you, Mr. Geisler?

Mr. Geisler: Perfectly.

Mr. Geisler: With regard to this decree, as I take it, your Honor, we are not going into the matter of damages or recovery, but we are just going to the point of having determined whether the patent is valid and whether there has been an infringement, because I think the other should be taken up after the one question has been disposed of.

The Master: Well, I may say to both counsel, so far as any recommendation the Master will make in this case to the Court it will be upon the sole question as to whether or not the Willamette-Hyster device infringes or does not infringe upon that of the patent and whether or not the patent itself is valid, but I shall not undertake to make any recommendation to the Court as to the decree upon any other device.

Mr. Geisler: Yes, sir.

(The witness thereupon returned to the presence and hearing of the Master and resumed the witness stand and was examined and testified further as follows:)

(Testimony of Carl F. Gerlinger.)

The Master: Now, will you read the last question?

(The last question was thereupon read.)

A. Well, that——

Mr. Fryer: Now, wait a moment——

A. Well, it have four hydraulic cylinders, one cylinder on each corner, with automatic governor and clutch and automatic—I mean an operating valve.

Q. (By Mr. Fryer) Was one of the exclusive features of that Gerlinger hydraulic carrier a brake which was automatically applied [268] when an automatic stop ended upward or downward movement of the load-lifting device?

Mr. Geisler: Just a moment. I may not understand your Honor's ruling, but I believe I shall object. I object to the question as immaterial and irrelevant. We are not concerned with a hydraulic lift here. We are concerned only with a mechanically operated lift.

The Master: It will be received solely upon the proposition that the plaintiff has already given testimony, given testimony upon direct examination, as to the extent of the use of the device, of machines including the device in the patent; in other words, upon the question of commercial success. You may answer. Was that question answered?

The Reporter: No, not yet.

The Master: You may answer the question, Mr. Gerlinger.

(Testimony of Carl F. Gerlinger.)

A. What—— [269]

The Master: The question was whether or not the hydraulic machine which was advertised contained any braking device. That is correct, is it not?

Mr. Fryer: In substance, yes, your Honor.

A. No braking device, no.

Q. (By Mr. Fryer) I now show you a copy of the May, 1924 issue of *The Timberman* and the advertisement appearing at page 147 entitled “Gerlinger Lumber Carrier”, and ask you to state whether that is one of the advertisements of your company’s hydraulic carrier put out by it?

A. Yes.

Mr. Fryer: I now offer in evidence page 147 of the May, 1924 issue of *The Timberman* and ask to substitute for that original page a photostatic copy thereof and that it be marked Defendants’ Exhibit 20.

The Master: Any objection, Mr. Geisler?

Mr. Geisler: No, your Honor. This may be taken—as I understand, all of this is merely for the purpose of,—upon the issue of commercial success?

The Master: That is all I am receiving it for.

Mr. Geisler: All right.

The Master: It may be received and marked Respondents’ Exhibit 20.

Mr. Geisler: It may go on on that line.

The Master: Very well.

(Testimony of Carl F. Gerlinger.)

(Said page 147 of *The Timberman*, issue of May, 1924, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 20.)

Q. (By Mr. Fryer) Likewise I show you a copy of the December, 1925 issue of *The Timberman*, and call your attention to the advertisement appearing at page 147 thereof over the name of Dallas Machine & Locomotive Works and ask you if that also is [270] one of the advertisements of your hydraulic carriers put out by your company?

A. Yep.

Mr. Fryer: I now offer in evidence page 147 of the December, 1925 issue of *The Timberman* and ask to substitute a photostatic copy for the original thereof and that it be marked Defendants' Exhibit 21.

The Master: So marked and received.

(Said page 147 of *The Timberman*, issue of December, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 21.)

Q. (By Mr. Fryer) I now show you the advertisement appearing at page 170 of the December, 1925 *Timberman* and ask you to state whether or not you recognize the machine shown in the advertisement at that page as one of the machines sold in competition with yours?

(Testimony of Carl F. Gerlinger.)

The Master: What was that page, Mr. Fryer?

Mr. Fryer: 170, your Honor.

A. What was that question, please?

(The question was thereupon read.)

A. That is right.

Mr. Fryer: I now offer in evidence page 170 of the December, 1925 Timberman and ask to substitute a photostatic copy of that page and that it be marked Defendants' Exhibit 22.

The Master: It will be so received and marked and the substitution made.

(Said page 170 of The Timberman, issue of December, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 22.)

Q. (By Mr. Fryer) Will you state whether or not any of the manufacturers of any of the competing carriers illustrated in the [271] advertisements referred to so far were licensed by you or your company under the patent in suit?

A. I didn't get that quite correct.

(The answer was thereupon read.)

A. No.

Q. None of those competitors of yours were working under a license from your patent in suit?

A. No.

Q. The answer is that none of them were?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now I would like you to look at the December, 1928 issue of *The Timberman*, and the advertisement appearing at page 165, and ask you to state whether that also is one of the advertisements of your hydraulic carrier put out by your company?

A. That is right.

Mr. Fryer: I offer in evidence, pursuant to the procedure followed, a photostatic copy of page 165 of the December, 1928 issue of *The Timberman*, and ask that it be marked Defendants' Exhibit 23.

(The photostatic copy of page 165 of *The Timberman*, issue of December, 1928 was thereupon received in evidence and marked Respondents' Exhibit 23.)

Q. (By Mr. Fryer) All of the Gerlinger machines as shown in the various advertisements referred to so far were adapted for hauling various kinds of products in industry, is that true?

A. That is true.

Q. They haul brick and cement and all sorts of industrial products, is that correct?

A. That is right.

Q. They are not confined solely to the use of hauling lumber, is that true? [272]

A. No, that is right.

Q. You have pointed that fact out to the trade in your various advertisements, and so forth?

A. That is correct.

Q. Now, after all this period of advertising the hydraulic type [273] of carrier the first time that

(Testimony of Carl F. Gerlinger.)

your company advertised a different type of carrier, not hydraulic, was about in March of 1929, is that right?

A. May I—I wouldn't make that statement, '29. I don't remember.

Q. Well, to refresh your recollection in that regard I show you the March, 1929 issue of *The Timberman*, page 117, wherein you bring out the fact that your company was making then both a mechanical and hydraulic lift, and ask you to state whether or not that refreshes your recollection that you first started advertising a machine other than hydraulic in or about March of '29.

A. That is right.

Mr. Fryer: I offer in evidence a photostatic copy of page 117 of the March, 1929 issue of *The Timberman*, and ask that it be marked Defendants' Exhibit 24.

(Photostatic copy of page 117 of *The Timberman*, issue of March, 1929, was thereupon received in evidence and marked Respondents' Exhibit 24.)

Q. (By Mr. Fryer) Now, during the years 1922 to the early part of 1929 did you or the Dallas Machine & Locomotive Works manufacture and sell any machine to use as a lumber carrier other than the hydraulic carrier as shown in your various advertisements? A. No.

Q. Now, after you discontinued the hydraulic carrier did the Dallas Machine & Locomotive Works

(Testimony of Carl F. Gerlinger.)

manufacture a carrier having in it a member like the bar 67 on Exhibit 6 which moves the clutch to neutral when pushed by the load in the machine?

A. I would like to hear that question again, please.

(The question was thereupon read.)

A. Yes. [274]

Q. When was that machine having that bar 67 in it constructed subsequent to the termination of your hydraulic carrier? A. 1929.

Q. Was the——

A. About. About 1929, I will say.

Q. How did the shape of that bar in the machine built in 1929 compare with the bar 67 shown on the Exhibit 6?

A. Practically the same.

Q. How many more machines having a member in it like the bar 67 and having the function of the bar 67 did the Dallas Machine & Locomotive Works make after 1929?

A. Around a hundred.

Q. When did it make the last of those machines containing the bar 67 in it?

A. Oh—I take it back. I am wrong on that question, your Honor. 67, we didn't make any only ten of the machines like this. We didn't make any since '29.

Q. In other words, when you abandoned the hydraulic type of machine in 1929 you did not go

(Testimony of Carl F. Gerlinger.)

back to the manufacture of a machine containing a bar like 67 of your patent, is that right?

A. That is right.

Q. In the machines having a bar like the bar 67, that bar does not perform any work in the machine unless there is a load in the machine which moves upwardly and pushes the bar up, is that true?

A. That is true, yes.

Q. Does it make any difference in the operation of the machine of your patent in suit what sort of motive power is employed to drive the mechanism?

A. Yes, it would.

Q. In other words, your patent could not possibly be infringed by a machine which was operated by a steam engine, is that right?

A. Well, yes, by a steam engine. [275]

The Master: Well, now, what does he mean,—could or could not be?

Mr. Fryer: I am coming to that, your Honor. Your opinion is, now, that a machine which is driven by a steam engine instead of a gasoline engine could or could not contain the invention of your patent?

A. Not with the steam engine, no.

Q. In other words, in order to have the invention of your patent a person must use a gasoline engine, is that right?

A. A gasoline engine.

Q. And no machine or carrier having any kind of motive power other than a gasoline engine would infringe your patent, is that right?

(Testimony of Carl F. Gerlinger.)

A. Well, I don't know, I couldn't answer that question. I think there is a legal question there.

Q. Do you understand the invention of your patent in suit well enough to be able to recognize it when you see it in a construction? A. Yes.

Q. Is it then your opinion as the originator of this supposed invention that you could find it in a lumber carrier having a steam motor instead of a gasoline motor?

A. Well, I would answer this question with the steam would be entirely different than with the gas motor.

Q. Then your answer is that if the machine of your patent were so constructed that the engine in it were a steam engine instead of a gasoline engine it would not contain what you would consider to be your invention, is that true?

A. Well, I wouldn't answer that question. I don't know.

Q. Well, do you consider that the gasoline engine is an indispensable part of the thing which you consider the invention of your patent in suit?

A. What is that question? [276]

(The question was thereupon read.)

Mr. Geisler: I think I will object to that question, your Honor. I don't think it is fair to the witness. It really involves a question at law. Supposing he had a steam turbine, it could be operated. Whether that is or is not the equivalent of a gasoline motor is for your Honor.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I have some authorities upon that point, if your Honor please. It is well established that the inventor, who is the appraiser of his invention, is the best judge of that, and cross examination intended to develop what the invention is in his mind is the ultimate test. In the case of Wood against Peerless Motor Car Corporation, 75 Fed. (2d) 554, at page 555, the court there states and holds that the inventor's own appraisal of the nature of the invention is of great importance.

In a similar ruling of the Circuit Court of Appeals for the Sixth District, Smith Corporation versus Lincoln Electric Company, 82 Fed. (2d) 226, 229, the Circuit Court of Appeals said, in passing, "The paper had a substantial function and effect"—paper was the subject matter involved—"which Smith considered essential to his invention. His appraisal of the nature of his invention is of great importance."

And there are further authorities to the same effect.

The Master: Yes, but how does that become important in this particular patent?

Mr. Fryer: Laying foundation for further cross examination, it will give a very definite and succinct definition of what this man really contributed to the art, if anything, and when the cross examination reaches that point I think the purpose of this examination here will be quite clear and prove to be quite helpful.

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: If your Honor please, I would like to——

The Master: You may go ahead.

Mr. Geisler: There is nothing to show that any particular [277] kind of a motor with this particular invention is an indispensable element. If some feature of this particular machine is indispensable, for instance, those stops which control the lift, either up or down, they are indispensable. That, now, whether the substitution, as I take the question—counsel is asking the witness whether the substitution, as for instance, a steam turbine, for a gasoline motor, all other things being the same, whether that is indispensable. Well, I don't think that is a fair question, because it is a legal question. If they base it on the point whether it is a fair equivalent or not an equivalent, that is one thing, but it is illogical to us that if there is any difference between any kind of rotary device connected by a coupling mechanism with the other parts, the raising and lowering mechanism has anything to do with it. Now, I can't see that it has anything to do with this question whatsoever, and I object to it.

The Master: Until I am better advised I shall sustain that objection. I can see in the claim in question an element which may or may not, from a mechanical standpoint, rule out a particular source of power. I will not further particularize it.

Mr. Fryer: May I have the answer to the question under the rule, if your Honor please?

(Testimony of Carl F. Gerlinger.)

The Master: Yes, I will permit you to take the answer under the rule.

A. What was the answer, please?

The Master: Read the question to the witness, please.

A. I mean the question.

(The last question was thereupon read.)

A. Read it to me again. I can't get it through my head.

(The last question was again read to the witness.)

A. Yes. Yes.

Q. (By Mr. Fryer) A machine not having a gasoline engine in it, then, would not be one employing the invention of your patent [278] in suit, would it?

Mr. Geisler: The same objection to that.

The Master: I shall sustain the objection. You may take it over the ruling, if you desire.

Mr. Fryer: I will ask for the answer.

A. What was that question?

(The question was thereupon read.)

A. I couldn't answer that question.

Q. (By Mr. Fryer) Why not?

A. Well, it is a legal question there, to my judgment.

Mr. Fryer: May I have that answer there?

(The answer was thereupon read.)

Q. (By Mr. Fryer) What is legal about it that you don't understand? What word in the question do you not understand?

(Testimony of Carl F. Gerlinger.)

A. Well, steam and gas,—with steam you have to change the construction and principle. It takes a different arrangement entirely.

Q. I suppose your answer would also be that if someone employed an electric motor instead of a gasoline motor in the machine of your patent such a machine would not contain the invention of your patent, is that true?

A. The electric motor would be the same way. You act entirely different. Electric power is not—electricity is an entirely different matter again.

Q. So that as you see it the thing which you created when you made the invention of your patent in suit was one which had a source of power which was a gasoline engine and not an electric motor or a steam engine, is that true?

A. That is right.

Q. Now, will you name the first mechanical factor which indicates to you that a machine with an electric motor in it for raising and carrying lumber would not be the machine of your patent? [279]

A. Well, an electrical would be entirely—the construction would have to be entirely different.

The Master: In what respect?

A. Well, your stop. Electric motor is operated by electricity, so you would have an electric switch——

The Master: Contact switch?

A. Yes, a contact switch, or you stop the motor, and here you do not stop the motor, it is entirely—

(Testimony of Carl F. Gerlinger.)

I think,—I can't make myself believe, Your Honor,—but I think you can prove that the electric power can't compare with it, as the construction entirely would have to be changed. That is my judgment here.

The Master: All right, gentlemen, we will resume.

Q. (By Mr. Fryer) Will you name the first mechanical construction which in your opinion differentiates an electrically driven lumber carrier from the one shown in the drawings of your patent.

The Witness: Let's see. What is the first part of the question there?

(Last question read.)

A. If you use an electrical motor you have got to have a reversible clutch. Is that the question?

Q. What do you say then is the first mechanical structure which differentiates an electrically driven lumber carrier from that shown in your patent?

The Witness: Will you give me that question again?

(Last question read.)

A. I don't know if I can answer that question. If this question is right, an electrical driven, if you used the same—if you use a reversible clutch you can drive that electrically as well as with the gas. Is that your question?

Q. I understand then that in your opinion the first mechanical [280] difference you would have to

(Testimony of Carl F. Gerlinger.)

have to drive your lumber carrier electrically would be a reversible clutch; is that correct?

A. That is right.

Q. The drawings and the description of your patent in suit do not show a reversible clutch?

A. It sure does; don't it?

Q. Will you look at the drawings of your patent in suit and point out what you understand is the clutch in those drawings. May the witness have Exhibit 2, please?

A. On page 1, on line 100, "The lifting device is operated by the following mechanism. Power is transmitted from the shaft 46 of the engine through a reversible clutch of any desired type operated".

Q. So the mechanism shown in your drawings and described in your specification in your patent provides for a reversible clutch; is that right?

A. Reversible clutch, yes.

Q. Now in the drawings that reversible clutch is merely shown from the outside; that is, only the external casing of the clutch is shown in the patent drawings; is that true?

A. Yes, that is true.

Q. And a handle or operating lever is shown extending from that housing as a means to operate the clutch; is that right?

A. Yes, that is right.

Q. In other words, in Figure 2 the reference character 47 points to the housing in which this reversing clutch is supposed to be contained; is that your understanding?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. And the lever 48 is shown extending from that housing as a means by which the reversing clutch mechanism of any kind contained in the housing can be operated; is that your understanding? A. Yes.

Q. All right. Now will you name the next mechanical feature [281] which in your opinion makes it impossible to use the mechanism of your patent in suit with an electric motor.

A. There is no other feature as I know of it.

Q. In other words, the construction and arrangement of your reversing clutch 47 is the thing which you understand makes the invention of your patent peculiarly suited to operation by a gasoline engine; is that right?

A. No, not particularly a gasoline engine.

Q. It could be operated by electric motor as well?

A. Motor, or any source of power, if you use the reversible clutch, but you have to use this reversible clutch with this setup.

Q. And *you* patent shows such a reversible clutch, does it? A. Absolutely.

Q. And your testimony now, then, is that you can use any source of power in the mechanism of your patent, steam or electricity or Diesel engine, to operate the mechanism of your patent, provided you have this reversible clutch 47; is that right?

A. That is right, yes.

(Testimony of Carl F. Gerlinger.)

Q. What you said before recess to contrary effect is not correct; is that true?

A. Well, I meant this: that you couldn't do it without, if you don't—if you have an electric and take this clutch, or take them out, you couldn't operate it.

The Master: Take what out?

A. I mean if you take any feature out of that reversible clutch you couldn't operate an electric motor.

Q. (By Mr. Fryer) You merely mean to say by that, that your reversible clutch is perfectly well suited to operation by electric motor; is that true?

A. No; no. If you let the motor run one way, when you have got to run one way and you let the motor run and cut the power off by the reversible clutch, all right. [282]

Q. Now I think your testimony has varied a little bit on that question and I want to clear it up, if I can, by just a few simple questions. Is it your understanding that with the mechanism shown in your patent, including the reversible clutch 47, it is possible to operate your mechanism with an electric motor?

The Witness: Repeat that.

(Last question read.)

A. Yes; yes.

(Testimony of Carl F. Gerlinger.)

Q. You can find then the invention of your patent in a lumber carrier having an electric motor as its source of power, can you?

A. Source of power; that is right.

Q. Any source of power?

A. Any source of power.

Q. Electric, Diesel or steam?

A. That is what I tried to bring out there as a legal point, what the power got to do with it.

Q. Now is it your understanding, not as a legal proposition but as a mechanical one solely, that the invention of your patent can be found in a lumber carrier having any source of power, gas, steam or electric?

A. Mr. Fryer, I couldn't understand what you was driving at.

Mr. Fryer: Let's forget the past and just answer this question. May I have the question read, please?

The Witness: You could use any kind of power, any source of power, with a reversible clutch.

Mr. Fryer: Now can I have the question read and get a direct answer to it, please.

(Last question read.)

A. That is right.

Q. In the drawings of your patent are the internal parts of the clutch contained in the housing 47 shown?

A. They are described, but the drawing don't show, but they are described in the patent. [283]

(Testimony of Carl F. Gerlinger.)

Q. The individual parts themselves?

A. No, not individual parts. The reversible clutch.

Q. In other words, the patent merely attempts to say that in this box 47 you have any kind of a reversing clutch mechanism?

A. Any kind of a reversible clutch; yes, sir.

Q. And all you need to have is some kind of a handle sticking out of that housing, or lever projecting out of the housing to operate the mechanism in the housing 47; is that right?

A. Well, it would have to be automatically controlled.

Q. Well, all that the part 47 needs in order to meet the requirements of your patent is that it shall be a means to control power that can be set in neutral, or in forward, or in reverse position; is that right?

A. Yes.

Mr. Fryer: May I have just a moment, your Honor. We have an enlarged view of the drawings of the patent which may facilitate reference to it, your Honor.

Mr. Geisler: We have another one here, if you want it.

Mr. Fryer: I ask to have marked for identification the enlarged chart placed before the witness as Defendants' Exhibit 25.

The Master: Respondents' Exhibit 25 for identification. Now I understand these are enlarged patent drawings?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Yes, your Honor.

(The enlarged patent drawings were thereupon marked for identification Respondents' Exhibit 25.)

Q. Is the brake member 76 in the drawings of your patent a friction brake? A. Yes.

Q. Between what parts of the mechanism does the braking friction occur which is applied by that brake? [284]

A. On the end of the shaft.

Q. When you refer to the shaft, what shaft in your patent do you mean?

A. The extension of 76. I mean the shaft from the worm out, from the worm housing out, right here (indicating.)

Q. When you say "right here" you point to the mechanism shown overlying the lever 76 on the enlarged drawings of your patent? A. Yes.

Q. Now referring to Figure 2 of the drawings of your patent, will you state whether or not this clutch operating lever 48 extends over or under the final drive housing which extends across the frame of your machine?

A. Which lever are you referring to?

Q. Clutch operating member 48.

A. It is running—this is the lever right here—

The Master: When you say "this is the lever", what?

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) Will you state whether the clutch operating lever 48, which you just pointed to, extends over or under the final drive housing of the machine shown in the patent drawings? A. Under.

Q. That is what you understand by——

A. Yes.

Q. —the full line marking of the lever 48 shown in Figure 2 crossing over the top of the final drive housing; is that right?

A. Not over the top; under.

Q. You understand that 48 passes under the final drive housing? A. That is it.

Q. And it is not shown in dotted lines in the drawings, Figure 2, to indicate that construction, is it? A. It shows very plainly here.

Q. Do you see the straight black line extending from the upper toward the lower side of Figure 2 which crosses the lever 48? [285] I am merely asking you whether you see that line. A. Yes.

Q. That is the front line of the seat; is that right? A. Yes.

Q. Now that line crosses the lever 48? You so understand the drawing? A. Yes.

Q. And at the point where it crosses the lever 48 the top and bottom lines of the lever 48 are full and not dotted lines; is that correct?

The Witness: Give that question to me again.

Mr. Fryer: Will you read the question?

(Last question read.)

(Testimony of Carl F. Gerlinger.)

A. Are full and not dotted lines. That is right.

Q. Do you understand that in drawings of this kind dotted lines——

A. Yes.

Q. —represent figures that you see through——

A. Yes.

Q. —another part? A. Yes.

Q. And if a line is solid, that means that you see the part without any other part overlying it?

A. Yes.

Q. Is that your understanding? A. Yes.

Q. Do you see any part of the lever 48 dotted from the front line of the seat to the clutch 47?

The Witness: Read that question.

(Last question read.)

A. Yes.

Q. It is dotted as you see it, is it?

A. Not in the front; in the back.

Q. Behind the seat?

A. Behind the seat. [286]

Q. But forwardly of the seat no part of the lever 48 is shown in dotted lines; is that right?

A. No.

Q. Well, is it right or wrong?

A. You are right.

Q. Now in front of the seat shown in full lines we also see the final drive housing of your patent; is that right? A. Where do you show it?

Q. Well, can you see the final drive housing on Figure 2 of the drawings of your patent?

(Testimony of Carl F. Gerlinger.)

A. Yes; right here (indicating).

Q. All right. Now will you tell us whether the lever 48 passes over or under the final drive housing?

A. Under.

Q. It passes under it? A. Yes.

Q. As you see it in Figure 2? A. Yes.

Q. And that is your best understanding of the drawing of the patent; is that right? A. Yes.

The Master: Is 44 the final drive housing?

Mr. Fryer: Yes, your Honor; it is the final drive housing at one end. The other end is a similar structure on the opposite side of the machine.

Q. Now do you know what the reference character 20 in the specification of your patent refers to?

The Witness: Which was that?

Mr. Fryer: Read the question, please.

(Last question read.)

A. No, I don't understand it.

Q. That is the best answer you can make to that question also, isn't it, Mr. Gerlinger? [287]

A. Yes.

Q. Now I call your attention to page 2, lines 125 and 126 of your patent, where reference is made to means for manually moving the clutch to operative position. Is the part of the Gerlinger mechanism there referred to shown in the Gerlinger drawings of your patent in suit?

The Witness: Please read that.

(Last question read.)

A. 125 and 126?

(Testimony of Carl F. Gerlinger.)

The Master: Lines 125 and 126, right hand lower part of page 2, last paragraph.

The Witness: I don't find any such number here.

The Master: What he is referring to is this (indicating)——

The Witness: Oh, in the claims?

The Master: "Means for manually moving".
Now will you read the question to the witness.

(Last question read.)

A. Sure; yes.

Q. (By Mr. Fryer) Will you give me the number which is applied to that part on the drawings of your patent; and you may refer to the chart. Defendants' Exhibit 25 for identification, before you.

A. By moving—on this the hand lever is not shown here, and is shown 70 on Figure 1.

Q. You refer to the handle 70 in Figure 1?

A. Yes; by moving this lever and engaging the clutch.

Q. Do I understand you correctly then that the part referred to in your specification that I called to your attention, where it says "Means for manually moving the clutch to operative position", is the handle 70 of your drawings? A. Yes.

Q. Now if you look at line 130 of page 2 of your patent, and lines 1 and 2 of page 3, I will ask you to state whether the [288] part there referred to as "Means for braking the transmitting means whenever the clutch is moved to neutral position", is shown in the drawings of your patent?

(Testimony of Carl F. Gerlinger.)

A. That shows right here (indicating).

Q. What is the number of that part you are pointing to? A. 74 and 76.

Q. And 74 and 76 are the means for braking the transmitting means whenever the clutch is moved to neutral position, referred to in your patent; is that right? A. Yes.

Q. Now at lines 127 to 130—

A. And I also—excuse me.

The Master: If you want to explain you may.

Q. (By Mr. Fryer) Do you want to make any explanation? A. I also include lever 48, see.

Q. What do you mean? You include lever 48 in the means for braking the transmitting means whenever the clutch is moved to neutral position.

A. Neutral position, yes.

Q. Then 48 is the clutch actuating lever; is that right?

A. Yes. There is also the combination together. There is this operative clutch—operative clutch and also the braking means.

Q. Now the part 76, lever 76, is the brake lever itself; is that right? A. 76, yes.

Q. And the small lever lying below 76 and marked 74 is a lever with a cam at its upper end so arranged that movement of 74 shoves the cam under 76, lifts 76 and thereby applies the brake; is that correct? A. That is correct, yes.

Q. Now 48 is merely the part which moves the cam lever 74; is that right?

(Testimony of Carl F. Gerlinger.)

A. And also operates the clutch.

Q. We will come to that later, but I am talking about the brake now. [289]

A. Yes.

Q. And as far as the brake is concerned, all that 48 does is to provide movement of the cam lever there; is that right? A. 74 and 76.

Q. Well, I ask you is that right? Is it right or wrong? A. 74 is wrong.

Mr. Fryer: May I have—well, strike it. I will ask it again.

Q. Lever 74 is the lever that carries the cam on it to lift 76; is that right?

A. That is right, yes.

Q. And 48 is the part that moves 74 in order that it may do its work and lift lever 76; is that right? A. That is right; yes.

Q. Now when you say in your patent, “Means for braking the transmitting means”, you have then the parts 74 and 76 which do that work and they are actuated by the lever 48; is that your understanding?

The Witness: Give that question to me again.

(Last question read.)

A. That is my understanding.

Q. Now if you will look at your patent at lines 127 to 130, on page 2, you refer to “automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a pre-

(Testimony of Carl F. Gerlinger.)

determined extent in either direction''. Is the mechanism there referred to shown in the drawings of your patent? A. Yes.

Q. Will you give me a list of the reference characters which are applied to the parts making up that mechanism in the drawings of your patent.

A. Automatic stop, which is fastened on a rack bar, with a lever, move control lever, to move clutch in neutral position and drive the brake. [290]

The Master: That is number what?

A. 44. No—yes.

Q. (By Mr. Fryer) Mr. Gerlinger, I merely ask you to list the numbers applied to the parts constituting that mechanism in your drawings, and you described its operation. For the time being all I would like you to do for the Court is to list the numbers of the parts on the drawings of your patent which constitute the automatic means for moving the clutch to neutral position upon movement of the load lifting means a predetermined extent in either direction? A. By moving hand lever.

Q. Just give us the numbers of the parts.

A. By moving hand lever——

Mr. Fryer: I move to strike the answer, if your Honor please, as not responsive.

The Witness: 70 in operative position, that will engage clutch 47, and automatic stop 65, will trip that lever 65——

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May the Court please, I move to strike that answer as wholly irresponsible to the question.

The Master: He is giving numbers but interpolating in them a description of the numbers themselves. While perhaps it is not quite responsive, yet I do not think it is objectionable.

Mr. Fryer: Proceed with your answer, then.

The Witness: Trip 65, and when the shoe travels to the end of the travel will move lever in neutral position and apply the brake, and lever 60—move lever 60—48 and 74.

Q. Mr. Gerlinger, do you know your patent structure well enough just to give me a list of the numbers of the parts—— A. Well——

Q. Just a minute. Let me finish my question: a list of the numbers of the parts which constitute the automatic means for moving the clutch to neutral position on movement of the load lifting means to a predetermined extent in either direction? [291]

A. Well, I have to follow them up.

Q. Well, just give me the numbers. Can you do that, or can't you? A. Yes, I think I can.

Q. All right. Let me have the numbers.

A. 70, 48, 74, and 65, and 66. Offhand I would say they were in general all of them.

Q. You don't consider that the part 67 then has anything to do with moving the clutch to neutral position, or do you?

(Testimony of Carl F. Gerlinger.)

A. I have described——

Mr. Fryer: Just a moment. Answer the question, please.

A. Yes, in the upper movement with load.

Q. Then do you include 67 among the numbers which you would list as constituting the automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Yes, with load.

Q. Now that is all the parts that you have in mind in the drawings?

A. Right offhand. I wouldn't say that I am absolutely right, without following it up closer and giving it a study more.

Mr. Fryer: May I have an order striking the statement by the witness in interruption of my question, and then have the first part of my question read so I may continue it.

The Master: Yes. Strike it out and let the counsel finish his question, Mr. Gerlinger, before you answer. Let him finish his question.

The Witness: Yes.

Mr. Fryer: All right. Now may I have the first part of the question, please?

(The question was read as follows: "Now that is all the parts that you have in mind in the drawing"——) [292]

(Testimony of Carl F. Gerlinger.)

Q. (Continuing) —which are included in the language in your specification which refers to means for moving the clutch to neutral position on movement of the load lifting means to a predetermined extent in either direction; is that right?

A. Yes.

Q. In that enumeration of parts which you have given you have included the hand lever 70. Did you mean to do that?

A. Yes, I mean to do that.

Q. The hand lever 70 is intended for use by the operator in operating the machine?

A. For throwing in the clutch.

Q. Does the hand lever 78 do any work by itself automatically if the operator doesn't move it?

A. Well, the hand lever goes in neutral position.

Mr. Fryer: 70 I should have said. I beg pardon. Correct it to hand lever 70.

(The question as corrected was read as follows: "Does the hand lever 70 do any work by itself automatically if the operator doesn't move it?")

A. No, no. Yes, it does.

Q. What work does the hand lever 70 do by itself and without manipulation by the operator?

A. The hand lever is connected to it.

The Master: The question was, not whether it moved but whether it did any work under the automatic operation. That is your question?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: That is the question, your Honor.

A. It does the work, yes. Without a lever it couldn't do the work. [293]

Q. That may be a very interesting problem of operation, but what I want to know is this: When your automatic mechanism functions in the machine to throw the clutch in neutral, does the hand lever 70 perform part of the work of pushing the clutch into neutral? A. No; no.

Q. Now you have included in the list of parts described in the specification as automatic means for moving the clutch to neutral position the part 74. Did you intend to do that?

A. 74? Sure.

Q. 74 is the cam lever which actuates the brake 76; is that right? A. Yes, that is right.

Q. Now what part of the work of pushing the clutch into neutral is performed by the brake actuating lever 74? A. 74 operates the brake.

Q. And does that push the clutch into neutral?

A. No.

Q. Then do you say that the part 74 performs any part of the work of pushing the clutch into neutral?

The Witness: Give me that question again.

(Last question read.)

A. The clutch—the clutch and the brake levers are all connected together.

Q. I understand that; but also that you don't want to answer that question directly.

(Testimony of Carl F. Gerlinger.)

A. Sure I want to answer it if I would know how to answer you.

Q. Just a minute. I will put the question again in this form. When the mechanism of your patent operates automatically to push the clutch into neutral, does the brake actuating lever 74 do any of the work of pushing the clutch to neutral?

A. No.

Q. Then we have left, among the parts which you have enumerated [294] which function automatically to move the clutch into neutral, the member 67, which is colored black on this chart, Exhibit 25, the set screw 65, also colored black on this chart, the bell crank lever 66, also colored black on this chart?

A. Yes.

Q. And according to your description the clutch actuating lever 48; is that correct; as the parts which operate automatically to move the clutch to neutral?

A. You say too many figures to think all at once.

Q. All right; I will say it again then and make it simpler for you. Am I correct now in understanding that the parts of the drawings of your patent which do work in moving the clutch to neutral automatically are the member 67, which is struck by the load, the bell crank lever 66, and the set screw 65, and, according to your statement, the operating lever 48?

(Testimony of Carl F. Gerlinger.)

A. The bell crank had nothing to do with the lever 67.

Q. I didn't ask you that, Mr. Gerlinger. I will have to put the question again, if you don't want to answer it directly.

A. Well, I will answer it if——

Q. Is it a fact that in the drawings of your patent, that the parts which do work to push the clutch to neutral when the mechanism operates automatically to stop the load lifting means, are the parts 67, the set screw 65, the bell crank lever 66, and the clutch lever 48? Is that true or not true?

A. Well, I don't know if you got all the members. I wouldn't say if it is true or not true.

Q. You don't know; is that it?

A. No, I wouldn't say without tracing them more out.

Q. Well, do you remember that a few questions ago you stated that the parts in the drawings of your patent which constituted automatic means for moving the clutch to neutral position on movement of the load lifting means a predetermined extent in either direction were the parts 74, 70, 48, 65, 66 and 67? [295] Do you remember saying that?

A. Yes, I remember those.

Q. Yes, now do you remember that in a few subsequent questions we agreed, I thought, that the hand lever 70 and the brake actuating lever 74 included in that list did no part of the work of push-

(Testimony of Carl F. Gerlinger.)

ing the clutch to neutral? Do you remember that?

A. Well, I still claim——

Q. Or do you disagree with that?

A. I still—I don't—I wouldn't say. I am kind of mixed up on it. I don't want to say until I am right in my mind.

Q. Well, you said it once. Now do you want to take it back?

A. No, I don't want to take it back, except I studied it over.

Q. Well, have you studied it over enough now to want to say that 74 and 70 do some of the work of pushing the clutch to neutral?

A. 74—no, I wouldn't say that. That clutch 74 is applying the brake and releasing the brake.

Q. Well then, isn't it true and accurate to say that in the drawings of your patent the parts which actually do the work of pushing the clutch into neutral upon a movement of the load lifting means to a predetermined extent in either direction are the parts 67, bell crank 66 and set screw 65, and, if you want, the clutch lever 48?

A. Well, I would not want to say except there may be another number or two short.

Q. Well, maybe you are referring to the cam 69 on the end of the lever 67. That is part of 67, isn't it?

A. Yes, that is right, 67.

Q. And 68 is the pivot of the lever 67, isn't it?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Well then, let's add the parts that I have just mentioned, then, and ask you this: Isn't it a true and correct statement [296] that the parts 65, 66, 67, 68 and 69 are the parts which actually do the work of pushing the clutch into neutral when the load lifting means have reached a predetermined point in either direction, including the clutch lever 48?

A. Well, I want to answer you this question, but I want a little time to study this and to know myself before I may answer that question correctly.

Q. Well, let me ask you this: Do you know what the part 67 in the drawings of your patent is?

A. Yes.

Q. Do you know how it works? A. Yes.

Q. Do you know what the part 66 is?

A. Yes.

Q. Do you know how it works? A. Yes.

Q. Do you know how the part 65 works?

A. Yes.

Q. Do you know how the part 48 works?

A. Yes. But there is more than that to it.

Q. Do you know how the part 76 and the part 74 work? A. Yes.

Q. Well then, what is it that you don't know about this machine which prevents you from answering—— A. Well, I want——

Mr. Fryer: Just a minute. Don't interrupt my question. May I have the question as far as I have gone, please?

(Last question read.)

(Testimony of Carl F. Gerlinger.)

Q. (Continuing) —my question?

A. I don't want to answer that question until I am sure that I have got all the numbers in it.

Q. What is it in the drawings of your patent which confuses you and makes you unable to state what parts, if any, other than 65, [297] 66, 67, 68, and 69 and 48, do the work of pushing the clutch to neutral?

A. Well, offhand, that you have to follow up to make it clear in your mind. I would say that I wouldn't make a statement that I am absolutely right and follow all the numbers out and then answer my questions. Huh?

Q. Did you have anything to do with the making of the invention of this patent?

A. You bet, yes.

Q. Do you know anything about how the machine as a whole works?

A. You bet I do know.

Q. Do you know anything about the reference characters on the drawings? A. Yes.

Q. And know what they represent?

A. Yes; yes.

Q. Can you point to anything in the drawings of this patent which you do not understand?

A. No, no.

Q. Can you point to anything in the specifications of your patent which you don't understand?

(Testimony of Carl F. Gerlinger.)

A. Well, I wouldn't say. Maybe I don't. No, I understand everything, but offhand talking that way you can get it twisted around and it is not the proper answer, but I want to try to get you—I will try to clear up and not hide anything here.

Q. I merely want to know what you understand about your patent. Now am I correct in understanding, then, that you understand all the drawings and all that is stated in the specifications of your patent so that there is nothing in there which you do not understand; is that right? A. That is right.

Q. All right. Now will you say that it is not true that the parts 65, 66, 67, 68, 69, and part 48, are the parts of your [298] mechanism which do the work of pushing the clutch into neutral position on movement of the load lifting means a predetermined extent in either direction?

A. No, I couldn't answer that question without checking over.

Q. As far as you know that is true; is that right?

A. No, I wouldn't say without checking over.

Q. Well, how long do you have to have to check it over?

A. Well, it will take me about five minutes maybe.

Q. All right; will you do it, please.

The Master: By the way, gentlemen, it is now ten minutes after five.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Well, I would very much like to be able to get this five minute interval right here, if I may, your Honor.

The Master: All right; we will wait for that. I had not realized it had gotten that late.

(Pause.)

The Witness: Well, I will tell you, Mr. Fryer, if you want to get this answer right it will take me more than five minutes.

Mr. Fryer: I suspected that. If your Honor please, I would like to see what the witness can learn in five minutes about his own patent here.

The Witness: Well, I can——

Mr. Fryer: So he can find out whether or not he can answer this question and, with your Honor's indulgence, I would ask that we may continue then for at least ten minutes more.

The Master: Take your time and look it over carefully, Mr. Gerlinger, so you can answer the question. In the meantime we will take a recess until he has had an opportunity to look it over.

The Witness: I am ready, your Honor, in roughly checking over. [299]

The Master: All right. Read the question to the witness.

(The last question read was re-read to the witness.)

A. Well, by checking over I find that 48, 63, 64, 65, 66, 67, 69 and 74, 75 and 76 and 77. Now I might not check that very accurately—accurate.

(Testimony of Carl F. Gerlinger.)

A. (By Mr. Fryer) Do you mean by your answer that the parts which you have now enumerated all perform part of the work of pushing the clutch into neutral position when the load lifting means have moved a predetermined extent in either direction?

A. I would say yes, but I wouldn't say that I am accurate without—I just checked over very roughly, see.

Q. In other words, you still are not sure of your answer? Is that it?

A. Well, I say I am not absolutely sure of my answer, why, if I left maybe a figure out of the thing.

Q. Well, how long would it take you to learn this patent of yours well enough to be able to answer definitely as to all of the parts which perform the work of pushing the clutch into neutral whenever the load lifting means have moved a predetermined extent in either direction?

A. Well, to make it clear it would take me a half hour to an hour.

Q. All right. Well, during the adjournment will you devote a half hour or an hour to a study of your own patent here and be prepared to answer that in the morning? A. Yes. Yes. [300]

The Master: Was there a substitution of photostatic copies for Exhibits 16 and 17?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Just a moment, Your Honor; I will find that out.

The Master: 15 is page 65 of the issue of October, 1926.

Mr. Fryer: I think not, Your Honor. I think they were merely, so far, marked for identification.

Mr. Aurich: There were two that were not.

Mr. Fryer: Those were all marked for identification, correct.

The Master: You may continue with your cross examination.

Mr. Fryer: May I have Plaintiff's Exhibit 1, please?

Q. (By Mr. Fryer) You have been handed a copy of your patent, Plaintiff's Exhibit 1. You have stated, I believe, that you once built a machine having the parts shown in the drawings of that patent, Plaintiff's Exhibit 1. On or about what date was that machine completed?

A. End of July, 1921.

Q. Where was that machine completed on that date? A. Dallas plant.

Q. Is that the machine which you have previously referred to in your testimony here as your first machine? A. Yes.

Q. Did that first machine, completed in July of 1921, contain an automatic brake? A. No.

Q. Did it contain upper—or did it contain automatic means for moving the clutch to neutral posi-

(Testimony of Carl F. Gerlinger.)

tion on movement of the load-lifting means a predetermined extent in either direction?

A. Yes.

Q. Did it contain parts having the construction and operation of the parts 90 and 91 on your drawing Exhibit 6 in July of 1921?

A. Bar 67 and 65 and—65.

Q. Have you completed your statement now?

A. Yes. [301]

Mr. Fryer: I move to strike the answer, if Your Honor please, as wholly unrelated to the question, and ask that——

The Master: The motion will be allowed.

Mr. Fryer: I ask to have the question read, please.

(The question was thereupon read.)

A. Not 90 and 91.

Mr. Fryer: What is that answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) That is to say, then, your first machine, completed in July of 1921, did not contain parts having the construction or operation of the parts 90 and 91 shown on Exhibit 6, is that right? A. That is right.

Q. After July of 1921 did you keep the machine which you completed at that time or did you dispose of it?

A. No, I kept the machine and rebuilt it.

Q. Where did you rebuild it?

(Testimony of Carl F. Gerlinger.)

A. In our plant.

Q. In Dallas? A. In Dallas.

Q. When did the rebuilding of that first machine become complete?

A. End of September, 1921.

Q. When that first machine was rebuilt in September of 1921 did it become the machine which you have referred to in your previous testimony as your second machine?

The Master: I don't get that question. Read that question.

(The question was thereupon read.)

A. No. It was the first machine.

Q. (By Mr. Fryer) Is it now your testimony that the machine completed in July of 1921 also was your first machine? A. Yes.

Q. So in your previous testimony when you referred to your first machine you referred throughout to the machine completed in [302] July of 1921 and the machine rebuilt in September of '21, is that correct? A. That is correct.

Q. Now, when this first machine was rebuilt, in September of 1921, did it at that date contain an automatic brake? A. Yes.

Q. Did it at that date contain automatic means for moving the clutch to neutral position on movement of the load-lifting means a predetermined extent in either direction? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Did it at that date contain parts having the construction and operation of the parts 90 and 91 on your Exhibit 6? A. Not 90 and 91.

Q. That is, the machine as rebuilt and completed in September of 1921 did not contain the parts having the construction and operation of the parts 90 and 91 on Exhibit 6, is that right?

A. That is right.

Q. After this machine was rebuilt in September of 1921 did you keep it or dispose of it?

A. Well, we delivered it to the Willamette Valley Lumber Company at Dallas.

Q. Where was the Willamette Valley Lumber Company of Dallas located at that time?

A. Right at Dallas, Oregon.

Q. How close to the Dallas Machine & Locomotive Works? A. Right next to us.

Q. And, as a matter of fact, the Dallas Machine & Locomotive Works and the Willamette Valley Lumber Company are all one property in Dallas, aren't they? A. No.

Q. Aren't they adjoining properties?

A. Adjoining property, yes.

Q. What is the relationship between the Willamette Valley Lumber Company and the Dallas Machine & Locomotive Works as it was in [303] September of 1921?

A. We had no relationship, except the manager and I are cousins.

(Testimony of Carl F. Gerlinger.)

Q. And that condition prevailed in September of '21? A. Yes.

Q. After you delivered the machine completed in September of 1921 to the Willamette Valley Lumber Company do you know what became of the machine after that?

A. The machine stayed in service until the end of 1922. Our Secretary-Treasurer can answer that question better, he got the shop record, what the date——

Q. I am only asking you for your own recollection and I want you to state now whether you personally have any recollection of what happened to this machine rebuilt in September, 1921, after you delivered it to the Willamette Valley Lumber Company? A. It was in operation.

Q. For how long? A. For a year.

Q. And then what happened to it?

A. We rebuilt her.

Q. Where did you rebuild it?

A. At Dallas plant.

Q. When that machine which you took back from the Willamette Valley Lumber Company was rebuilt in your plant did it become the third machine which you have referred to in your previous testimony? A. No. No, no.

Q. When you rebuilt it after taking it back from the Willamette Valley Lumber Company what did you do with it after that rebuilding?

(Testimony of Carl F. Gerlinger.)

A. We changed her into hydraulic.

Q. So that the machine which was rebuilt in September of 1921, after being used for a short time by the Willamette Valley Lumber Company, was taken back by the plaintiff and rebuilt into [304] a hydraulic machine? A. Yes.

Q. Is that correct? A. That is right.

Q. After you completed the rebuilding of this first machine in September of 1921 what machine did you next construct in the nature of a lumber carrier at the Willamette Valley Lumber Company?

The Master: You mean at the Willamette Valley Lumber Company?

Mr. Fryer: I mean at the Dallas Machine & Locomotive Works,—pardon me.

A. At October, first part of October, we started the second machine, and finished the third—finished two of them from October to February 1st, 1922.

Q. Referring, now, to the machine which you say you started in the first part of October of 1921 at the Dallas plant, when was that machine started at that time completed?

A. In September, 1921.

Q. Now, wait a minute. You say you started the design of it in October of 1921, and I am asking you when you completed building it?

A. The first machine?

Q. No, I am speaking about the machine which you say you started to build in October of 1921,

(Testimony of Carl F. Gerlinger.)

after you had rebuilt the first machine in September of 1921.

A. I stated at September finished the machine, end of September, 1921.

Q. Yes, I understand that; and you delivered that machine to the Willamette Valley Lumber Company, didn't you? A. Yes.

Q. And you later rebuilt that machine into a hydraulic machine, didn't you? [305]

A. Yes, and I——

Q. And then after that you started the construction of another machine? A. No. No, no.

Q. Oh, you never built another one after that.

A. After I built the first one what went to the Willamette Valley Lumber Company I started the second one in the first of October, and the third one—the two of them was finished by February 1st, 1922.

Q. I understand all that, but you are talking about things I am not asking you about and you are confusing your story. Now, let's go back and start all over again. You have just told us that you first built a machine that you completed in July of 1921. A. That is it.

Q. Do you remember that? A. Yes.

Q. And then you rebuilt that machine in September of '21 is that right?

A. I finished it in September, 1921.

(Testimony of Carl F. Gerlinger.)

Q. Yes; and after finishing rebuilding it in September, 1921 you delivered it to the Willamette Valley Lumber Company, is that right?

A. Yes, that is right.

Q. And then you took it back from the Willamette Valley Lumber Company and rebuilt it into a hydraulic machine, is that right?

A. And then——

Q. Now, is that right or wrong?

A. You are right.

Q. (By Mr. Fryer) After that machine was rebuilt into a hydraulic carrier I understand you commenced the construction of still another machine, is that true? The one you say you commenced [306] building in October, of 1921?

A. No, that is not right there. We built——changed it over to hydraulic, end of 1922,——

Q. Yes.

A. —and we built the same as those factory drawings show, 6, in October, 1921, and I stated that we finished two of the same model at February 1st, 1922.

Q. Well, but what I want to know is when did you finish the machine which you started in October of 1921. That one machine, when did you finish it?

A. End of September, 1921.

Q. How could you finish the construction of a machine in September when you commenced building it in October?

(Testimony of Carl F. Gerlinger.)

A. That was the second machine, what I start building in October.

Q. Well, now, let me see if I can help you out on that, Mr. Gerlinger. Do you still have in mind the machine which you took back from the Willamette Valley Lumber Company and rebuilt into a hydraulic machine?

A. Yes, that was a year later.

Q. All right. Well, let's forget that machine entirely, now, and go back to your plant in Dallas, and tell me the first thing that you did after September of 1921 toward building another carrier besides the one which you had rebuilt and delivered to the Willamette Valley Lumber Company?

A. Not besides, no. Model——

Mr. Fryer: Well, I move to strike that answer as not responsive to the question at all, Your Honor.

The Master: I think it is responsive, but I doubt very much whether you and the witness understand each other.

Mr. Geisler: That is the trouble.

Mr. Fryer: Well, may I have that question read, I think it is entirely proper.

The Master: The question was entirely proper. Now, listen very carefully to the question, Mr. Gerlinger. [307]

A. Yes.

Mr. Geisler: May I not suggest, Your Honor, for the purpose of expediting things, that these ma-

(Testimony of Carl F. Gerlinger.)

chines be referred to as number 2 and number 3, instead of always omitting purposely that designation?

The Master: Well, I can't control the form of the questions that counsel asks. The question is perfectly clear. In your judgment and mine it might be better to use them by number, but counsel is entirely within his rights.

(The question referred to was thereupon read.)

A. We built the second machine, started the second and third machine of the same model, at 1921, first part of October.

Q. (By Mr. Fryer) You commenced the construction of what you call the second machine in the first part of October? A. Yes.

Q. Is that your testimony?

A. Which our shop records will show.

Q. All right. Now, when did you complete the construction of that machine which you call the second machine, which you commenced in the first part of October of 1921?

A. I finished about—the two machines——

Q. I am not asking you about two.

The Master: Mr. Gerlinger, he is talking about the second machine. When did you finish the second machine. Don't pay any attention to the third machine.

A. Well, Your Honor, I built the two together.

(Testimony of Carl F. Gerlinger.)

The Master: That doesn't make a particle of difference. Just tell him when you finished the second. A. February 1st, 1922.

Q. (By Mr. Fryer) Now, did that machine which you call the second machine, completed on February 1st, 1922, contain an automatic brake?

A. Yes. [308]

Q. Did it contain the part corresponding to the part 67 of your patent in suit for moving the clutch to neutral upon movement of the load in the machine a predetermined extent in one direction?

A. I would like to——

The Master: Read the question.

A. Read the question.

(The question was thereupon read.)

A. No. It was in lowering it and hoisting it, in both directions.

Q. (By Mr. Fryer) Did the machine which you completed in February of 1922, and which you refer to as your second machine, contain a bar like the bar 67 shown in the drawings of your patent?

A. Yes.

Q. Did that bar operate to move the clutch to neutral position when the load pushed that bar upwardly? A. Yes.

Q. Did the machine which you completed in February of 1922, and which you call your second machine, contain the parts like 90 and 91 shown on your drawing Exhibit 6? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now, you have referred to another machine as your third machine. Was that one built along with and at the same time as your second machine?

A. Yes, that was built along with the second machine.

Q. So that commencing in October and ending in February of 1922 you built two machines, which you have called your second and third machines, is that right? A. Read that question again.

(The question was thereupon read.)

Mr. Fryer: I will correct that question to say October of 1921, if Your Honor please.

A. We built the three machines.

Q. (By Mr. Fryer) All right. Now, let's go back to what you call your second machine. Am I right in understanding that [309] you commenced building that machine in October of 1921?

A. What was this question?

(The question was thereupon read.)

A. In October, 1921 we started building the second machine, yes.

Q. (By Mr. Fryer) And that second machine was completed in February of 1922? A. Yes.

Q. Did you commence building the third machine which you have referred to in October of 1921? A. Yes.

Q. And did you complete that third machine in February of 1922? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. All right. Now, with respect to the third machine, as you describe it, completed in February of 1922, did it contain parts having the construction and operation of the parts 90 on your drawing Exhibit 6—90 and 91? A. Yes.

Q. Did it also contain a part like the part marked 67 on the drawings of your patent in suit?

A. Yes.

Q. Did it also contain an automatic brake?

A. Yes.

Q. After completing what you call your second and third machines, in October—in February of 1922, did you keep those two machines, or did you dispose of them? A. We disposed of them.

Q. Did either of them come back into your possession at any time subsequently? A. No.

Q. After completing your third machine, in February of 1922, did you build any more lumber carriers? A. Yes.

Q. What was the first lumber carrier which you built after February of 1922?

A. The fourth one, the same model. [310]

Q. The fourth one was the next one?

A. February—about February, 19—1922.

Q. Did that fourth machine, commenced in February, 1922, when completed contain parts having the construction and operation of the parts 90 and 91 on Exhibit 6? A. Yes.

Q. Did it also contain a part corresponding to the bar 67 of your patent in suit? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now, I understand that after completing your fourth machine—strike that, if you please, Your Honor. When was this fourth machine, which you started in February of 1922, completed?

A. About April.

The Master: Of what year? A. 1922.

Q. (By Mr. Fryer) Am I correct in understanding that after completing the fourth machine, in 1922, you constructed and completed six more machines having substantially the same construction and operation as your fourth machine?

A. That is right.

Q. All right; and those six additional machines contained parts substantially identical in construction and operation with the parts 90 and 91 on Exhibit 6, is that right? A. Yes.

Q. And each one of those additional six machines contained a part having the construction and operation of the part 67 of your patent in suit, is that true? A. Yes, that is true.

Q. After you completed the last of those six additional machines you did not thereafter build any further machine containing a part having the construction and operation of the part 67 of your patent in suit, did you?

A. Read that question back, please. [311]

(The question was thereupon read.)

A. No.

Q. Every one of the ten machines which we have now referred to, which contained a part having the

(Testimony of Carl F. Gerlinger.)

construction and operation of the part 67 of your patent in suit, also contained parts having the construction and operation of 90 and 91 on your Exhibit 6 except the first machine, is that right?

A. That is right.

Q. So that the first machine which you built is the only machine which you ever built which had only the part corresponding to 67 of your patent in suit to stop upward movement of the load-lifting means when it reached a predetermined point, is that true?

A. Yes.

Mr. Fryer: What is the answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) You have stated in your previous testimony, "I was the first to think of and to manufacture a carrier with a positive lift and automatic feature where automatic stop moved clutch in neutral position and applied the brake." By that answer did you mean that you produced a machine having those features before somebody else did?

A. Absolutely.

Q. Before whom else? Everyone, you mean?

A. In a lumber carrier, yes.

Q. In other words, by that answer you mean to inform the Court that no one else before you had ever produced a machine having those automatic features, is that right?

A. Not to my knowledge.

Q. And, also, you said in your previous testimony, "I was the first with a positive,—first to

(Testimony of Carl F. Gerlinger.)

think of and to manufacture with a positive lift with an automatic feature." You mean to [312] say that you were the first person who ever built a machine containing those features, is that right?

A. A lumber carrier.

Q. What do you mean by lumber carrier?

A. A carrier, straddle truck, what——

Q. Do those machines carry lumber only?

A. No.

Q. They carry all sorts of industrial products, do they? A. Yes, but they should——

Mr. Fryer: May I have that answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) Now, when you commenced the construction of what you call your second machine and put into it parts having the construction of parts 90 and 91 on your Exhibit 6, what was your reason for putting those parts in that machine?

A. To put—the reason for that was that if you raise the shoe without a load, that the automatic—that you would automatically cut it without the load, and it was——

Q. In other words—go ahead.

A. —and it was only duplication from the top.

Q. In other words, your purpose in putting the parts 90 and 91 in your second machine in addition to the part 67 was to fix the machine so that the load-lifting means would stop on reaching a predetermined point in an upward direction, irrespec-

(Testimony of Carl F. Gerlinger.)

tive of whether the machine had any load in it or not, is that right? A. That is right.

Q. The machine would not do that without parts 90 or 91, would it? A. Not without the load.

Q. Do I correctly understand your testimony to be that you first learned of the construction of the Willamette-Hyster's machine in September of 1935?

[313]

A. Get that question again. I didn't——

(The question was thereupon read.)

A. No.

Q. When did you first learn of the construction of the defendant Willamette-Hyster's machine?

A. About 19——about 1926, '27.

Q. How did you come to find that out in that year, 1926 or '7?

A. Well, through the advertising, or through the people and machine what they sold.

Q. You are referring now to advertisements put out by the defendant Willamette-Hyster Company, or the Willamette-Ersted Company?

A. Willamette-Ersted — no, the Willamette-Ersted—it was The Willamette Iron Works, Willamette Iron & Steel Works.

Q. The first advertisements which you saw, then, were advertisements put out by the Willamette Iron & Steel Company advertising the construction of the Willamette-Hyster's machine, is that right?

A. I don't get that, please.

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. I wouldn't say the Willamette-Hyster machine. At that time it was Willamette Iron & Steel.

Q. That was the name of the company at that time, as you understand it? A. Yes.

Q. There was no difference in the construction of the machine, though, advertised at that time and the construction of the machine as you know it at this time, was there?

A. Well, I couldn't say that, and I didn't inspect any.

Q. You didn't inspect any Willamette Iron & Steel machines in 1926 when you saw the advertisements of that machine, did you? A. No. [314]

Q. Was the Willamette Iron & Steel machine sold in competition with yours in 1926?

A. Yes.

Q. It was sold in and around Portland, Oregon?

A. Yes.

Mr. Fryer: May I have that question and answer read, if Your Honor please?

(The question and the answer thereto were thereupon read.)

Q. Knowing that the Willamette Iron & Steel Company was making a lumber carrier and selling it in competition with yours in and around Portland, you did not make any efforts to see what that machine was like, as far as its construction was concerned? A. No.

Q. Did anyone in your company pay any attention to how this competing Willamette Iron & Steel machine was built at that time?

(Testimony of Carl F. Gerlinger.)

A. Not that I know of.

Q. In other words, the Willamette Iron & Steel Company came on the market with a competing machine, and, so far as you know, neither you nor anyone in your company made any effort whatsoever to see what the construction of that machine was like; that is true, is it?

A. That is true, yes.

Q. You just let them sell this machine in competition with yours and paid no attention to it whatever, is that correct?

A. No, except in advertising what we saw; no more than that.

Q. Do you remember now whether or not the Willamette Iron & Steel's advertising literature which you saw in 1926 or '27 advertised the automatic stops and brakes contained in that machine?

A. No.

Q. You don't remember whether it said that or not?

A. No.

Q. Are you prepared to say that that advertising did not emphasize those features in the Willamette Iron & Steel Company's machine at that time?

A. I don't—I couldn't say that.

Q. As far as you know, those advertisements may have explained the construction and operation of the Willamette Iron & Steel machine's automatic stops and automatic brake, is that true?

The Witness: Did I answer that question?

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. No.

Q. (By Mr. Fryer): When you looked at a Willamette-Hyster machine, as you have stated you did in or about September of 1935, where did you find that machine to look at it in that way?

A. At Forest Grove.

Q. In Oregon? A. Yes.

Q. Did you have any trouble or difficulty in looking at that machine? A. Not at all.

Q. That was not a difficult thing to do with respect to one of the defendant's machines in the field, was it? A. What was that question?

(The question was thereupon read.)

A. No. I went for that purpose.

Q. Was that machine out in the open, or was it at somebody's plant, when you saw it in September of 1935?

A. It was at a lumber company's plant.

Q. Now, is it your understanding— What lumber company, by the way? A. Miller.

Q. The Miller Lumber Company, is that the name?

A. No—well, I couldn't tell you the name of it.

Q. Is it your understanding that the machine which you saw at [316] the Miller Lumber Company, if that is the name of the place, was the first machine made by Willamette-Hyster Company or its predecessors containing the construction which you say comes within claim 4 of your patent?

A. Give me that question again, please.

(Testimony of Carl F. Gerlinger.)

The Master: Read the question. I don't quite get it myself.

(The question was thereupon read.)

A. I couldn't say that. That is the first machine I saw.

Q. And, as far as you know, that is the first machine ever made by Willamette-Hyster Company containing construction which you believe comes within claim 4 of your patent, is that right?

A. Read that question.-

(The question was thereupon read.)

A. So far as I know. I mean that is the first one I saw.

Q. And I guess it is also the fact that, as far as you know, the Willamette-Hyster Company never tried to sell a carrier to any of your customers prior to September of 1935, is that right?

A. Oh, no. No. That is not the fact. They sold carriers to our customers.

Q. Had you never heard of any efforts on the part of Mr. Grab, working for the Willamette Iron & Steel Company, to sell Willamette Iron & Steel carriers to your customers prior to 1935?

A. Yes. Yes.

Q. And I suppose you never paid any attention to the fact that Mr. Grab, of Willamette Iron & Steel Company, was trying to sell carriers to some of your customers? [317]

A. Yes, I paid attention. We tried to get the order if we could.

(Testimony of Carl F. Gerlinger.)

Q. You never concerned yourself with what kind of a machine Mr. Grab was trying to sell to your customer, did you? A. No, no.

Q. You didn't know whether the machine that he was trying to sell to your customers contained features which you considered yours or not, did you? A. No.

Q. In other words, you were perfectly happy to have Mr. Grab to sell to your customers a machine containing features which you considered to be your own and didn't make any investigation to find out whether he was doing that or not, is that true?

A. It was not my business. I didn't think I would go around and look at what features are all on the machine.

Q. Well, were the fact recited in my question true at that time?

A. What was that question, please?

(The question referred to was thereupon read.)

A. I didn't make any investigation, that is true.

Q. Now, this machine which you looked at in September of 1935 at Forest Grove, in Oregon, that machine was at a place called the Forest Grove Lumber Company, wasn't it?

A. I couldn't say. All what I know is the manager's name, Miller.

Q. And Mr. Miller is the manager for the lumber company where you inspected the machine in September of 1935? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Have you ever sold carriers to that concern managed by Mr. Miller at Forest Grove?

A. No.

Q. Have you ever tried to?

A. Not personally, no.

Q. Someone in your organization has tried to do so? A. I don't remember. [318]

Q. Can you name any one of your customers that you have referred to to whom Mr. Grab tried to sell carriers?

A. Sold to Shevlin-Hixon at Bend, Oregon, two.

Q. And when was that? A. 1935.

Q. Now, do you know of any other customer of the Dallas Machine & Locomotive Works to which Mr. Grab tried to sell lumber carriers at any time between 1926 and 1935?

A. Yes, Glendale Lumber Company.

A. Yes, at Glendale, Oregon.

Mr. Fryer: May I have that answer, Mr. Reporter, please?

(The answer was thereupon read.)

Q. Was that the Glendale Lumber Company at Glendale, Oregon?

A. Well, I wouldn't say sure if that is the lumber company's name.

Q. When did you find Mr. Grab attempting to sell a lumber carrier to that customer of yours at Glendale, Oregon?

A. About two or three years ago.

Q. Two or three years ago?

(Testimony of Carl F. Gerlinger.)

A. Yes, about.

Q. Is that the first occasion that you can now recall on which Mr. Grab ever attempted to sell any carrier to any customer of yours in competition with your machine?

A. Well, I have to do a little thinking.

Q. Well, will you please do that thinking and then answer the question.

A. Medford, Oregon.

Q. And on or about what date did Mr. Grab attempt to sell a competing carrier to one of your customers at Medford, Oregon?

A. I don't know what year.

Q. However, it was before the attempt to sell one to the company at Glendale, Oregon, is that your recollection?

A. Yes. [319]

Q. How long before?

A. I couldn't say how much before.

Q. A year or two?

A. I couldn't say that. I might be off a year or two.

Q. Do you remember the name of the concern at Medford, Oregon?

A. Owens-Oregon.

Q. How do you spell that, please?

A. Owens Lumber Company.

The Master: O-w-e-n-s hyphen Oregon.

Q. (By Mr. Fryer): Now, what if anything did you do when you found out that Mr. Grab was attempting to sell a competing carrier to the Owens-Oregon Lumber Company at Medford, Oregon?

A. Didn't do anything.

(Testimony of Carl F. Gerlinger.)

Q. You didn't concern yourself about whether or not the machine he was trying to sell to your customer contained features which you considered to be yours or not, did you? A. No.

Q. If Mr. Grab was doing that, that was something that you were perfectly satisfied to have him do?

A. Oh, no. I wouldn't be satisfied if I would have knowed it.

Q. It would have been something that you would have objected to very strenuously had you known about it, is that right? A. You bet!

Q. And yet you took no steps to find out whether or not this machine contained any features which you considered yours; is that also true?

A. Yes, that is true.

Q. (By Mr. Fryer): Did you ever supply for your attorney, Mr. Geisler, any circulars of the Willamette-Ersted Company showing the construction of the machine which you considered to be an infringement in this suit? A. Yes.

Q. Did you supply to Mr. Geisler the Willamette-Ersted Company's [320] circular which he attached to the bill of particulars filed in behalf of your company in this case?

A. Please state that again.

(The question was thereupon read.)

Mr. Geisler: I might say that is called "Service Manual" in the bill of particulars, so we will know what you are talking about.

(Testimony of Carl F. Gerlinger.)

The Master: That is what you refer to?

Mr. Fryer: Yes, Your Honor.

A. I did not. Mr. Waters, our general superintendent.

Q. (By Mr. Fryer): That Service Manual, which was entitled "Willamette-Ersted Company", did not carry the name "Willamette-Hyster" on it anywheres to your recollection, did it?

A. I don't remember.

Q. It is your understanding that Willamette-Ersted was the name of Willamette-Hyster Company before it was changed to Willamette-Hyster, is that right? A. That is right.

Q. Do you know where Mr. Waters obtained this Willamette-Ersted Service Manual which was handed to your attorney, Mr. Geisler?

A. What was that question, please?

The Master: Do you know where Waters got that manual? A. No.

Q. (By Mr. Fryer): Do you know when he got it? A. Sometime in September, 1935.

Q. Do you remember how long it has been since the defendant has been called the Willamette-Ersted Company? A. I don't remember.

Mr. Fryer: May the witness be shown Plaintiff's Exhibits 9, 10, and 11, if the Court please?

The Master: Certainly. You are about to go into another phase of the matter, are you?

Mr. Fryer: Yes, sir.

(Testimony of Carl F. Gerlinger.)

The Master: Well, the change of reporters is coming now and we will take a recess for five minutes. [321]

(A short recess was then had.)

Q. (By Mr. Fryer): I show you the drawing, Plaintiff's Exhibit 9, ask you to examine it and state whether or not you find in the construction represented on that exhibit parts having the construction or operation of the parts 90 and 91 on your Exhibit 6? A. 90 and 91 isn't on here.

Q. I now show you the drawing Plaintiff's Exhibit 10, ask you to examine that drawing and state whether or not the construction represented on that drawing contains any parts having the construction and operation of the parts 90 and 91 of your Exhibit 6? A. No, not on—90 and 91.

Q. The structure shown on Exhibit 10, then, does not contain parts having the construction and operation of 90 and 91 on Exhibit 6?

A. Not on this drawing.

Q. That drawing you have in your hand is Exhibit 10; is that right? Look at the back of it.

A. Exhibit 11.

Q. Eleven? A. Isn't it?

Mr. Fryer: I have got Exhibit 11 here.

The Master: Maybe I misnumbered them. The proper numbering is on the front.

Mr. Fryer: I have 11 in my hand, your Honor, and the bailiff has one which has 10 on the front of it.

(Testimony of Carl F. Gerlinger.)

The Master: Yes. That is wrong on the back.

The Witness: Yes.

Q. (By Mr. Fryer): The paper you now hold is Exhibit 10? A. That is right.

Q. And you do not find on Exhibit 10 any construction substantially identical in construction and operation with the parts 90 and 91 on your Exhibit 6; is that right?

A. There is nothing on like 90 and 91, no. [322]

Q. Now will you look at the drawing Plaintiff's Exhibit 11 and state whether or not the mechanism shown thereon contains any parts having the construction and operation of the parts 90 and 91 of your Exhibit 6? A. No.

Q. That mechanism also, then, is a mechanism which operates without having in it any parts like the parts 90 and 91 of Exhibit 6; is that your understanding?

The Witness: Give me that question, please.

(Last question read.)

A. That don't have any 90 or 91, no.

Q. 90 or 91. That is what I meant to say. The drawings 9, 10 and 11, as I understand your testimony, were made by someone for you?

A. Yes; Mr. Wetteland.

Q. And Mr. Wetteland was acting under your directions when he made those drawings?

A. Yes, sir.

Q. Did you supply Mr. Wetteland with any preliminary sketches or drawings for him to follow in making either exhibit 9 or 10 or 11?

(Testimony of Carl F. Gerlinger.)

A. Yes, I did.

Q. Have you got those sketches now?

A. No.

Q. Do you remember what they were like?

A. It was the same as this drawing shows.

Q. The sketches which you supplied to Mr. Wetteland were sketches showing the same construction as appears on Exhibits 9, 10 and 11?

A. Yes.

Q. Who made those sketches?

A. I did.

Q. When did you make them?

A. At the early part, May and June. [323]

Q. Of what year? A. 1921.

Q. Were those sketches as complete in every respect as the drawings which appear on Exhibits 9, 10 and 11?

A. I wouldn't say—I didn't make any complete working drawings. I had a man up in Dallas make them for me.

Q. What was the man's name up in Dallas you refer to? A. Name of Benton.

Q. How do you spell that?

A. B-e-n-t-e—t-e-n.

Q. B-e-n-t-e? A. t-t-e-e-n.

Q. t-t-e-n? A. Yes; and Mr. Parish.

Q. Mr. Parish and Mr. Benton then made the sketches which you used to instruct Mr. Wetteland how to make Exhibits 9, 10 and 11?

(Testimony of Carl F. Gerlinger.)

A. No, I made the sketches and they made some part of drawings as I instructed them.

Q. What happened to the drawings which they made? A. I furnished it to Mr. Wetteland.

Q. Do you know what he did with the drawings made by Parish and Benton? A. No.

Q. Now do you remember what the sketches were like which you supplied to Mr. Parish and Mr. Benton to prepare these drawings from?

A. As you see on this drawing.

Q. They were the same as Exhibits 9, 10 and 11 in every respect?

A. In every respect, yes. That is right.

Q. Were they on the same scale?

A. Well, they was working drawings. [324]

Q. Were they the same size as Exhibits 9, 10 and 11, the sketches which you gave to Parish?

A. I wouldn't say that.

Q. What would you say as to their sizes?

A. Well, I would say about the half size. [325]

Q. Except for the fact then that they were only half the size of Exhibits 9, 10 and 11, these original sketches which you made were in every respect the same as the drawings Exhibits 9, 10 and 11; is that true?

A. I didn't make a complete—as I stated, I didn't make any complete in detail like they are.

Q. Did these sketches which you say you made show all of the parts which you show on Exhibits 9, 10 and 11?

(Testimony of Carl F. Gerlinger.)

A. Yes, the principal. But, as I stated before, I didn't make any complete working drawings.

Q. I didn't ask you about working drawings. I am asking you about the subject matter of 9, 10 and 11, and I would like you to state now whether the sketches which you gave to Mr. Parish and Mr. Benton to make drawings from were half size reproductions of the drawings Exhibits 9, 10 and 11.

The Witness: Give me that question again, please.

(Last question read.)

A. I will say yes, about.

Q. And those sketches, if I understand you correctly, showed all of the parts which are shown on the drawings Exhibits 9, 10 and 11; is that true?

A. I wouldn't say that.

Q. Will the bailiff please give the witness Plaintiff's Exhibit 2, the patent in suit. In lines 10 and 11 of page 3 of the specification of your patent, Exhibit 2, reference is made to "a spring mounted to yield if too great a strain is applied to the load lifting means". Is the mechanism there referred to shown in the drawings of Exhibit 2?

A. What——

The Master: What lines are you referring to counsel?

Mr. Fryer: Lines 10 and 11 on page 3 of the specification.

Mr. Geisler: You refer to the claim? Is that the idea? [326]

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I refer to lines 10 and 11 of page 3 of the patent.

Mr. Geisler: Yes. It is not of the specifications; of the claim.

The Witness: Oh. Now I find it. What was that question, please?

Mr. Fryer: Read the question, please.

(Last question read.)

A. Yes.

Q. What number or numbers is or are applied to that mechanism in the drawings of Exhibit 2?

A. Figure 2 have you reference to? What is that question?

Q. I want you to state what numbers in the drawings of your patent, Exhibit 2, are applied to the part which you just stated is shown in those drawings, that part being a spring mounted to yield if too great a strain is applied to the load lifting means.

A. Figure 4—Figure 5 shows it.

Q. What is the number of the part, please?

A. 78, 80—78, 79, 80 and 82—and 81 and 82.

Q. The mechanism last referred to by you in the drawings of Exhibit 2, which you state comprises the parts 78, 79, 80 and 82, functions only whenever the device is overloaded beyond the point of safety; is that your understanding?

A. That is right.

Q. That is the explanation of that mechanism given in the specification at lines 63, '4 and '5 of page 2, where the patent says, "Whenever the de-

(Testimony of Carl F. Gerlinger.)

vice is overloaded beyond the point of safety, the springs will permit the clutch to slide on its shaft"; is that your understanding? A. On what page?

Mr. Fryer: On page 2, Mr. Gerlinger, lines 63, 64 and 65.

The Witness: What was that question, please? (Last question read.) [327]

The Witness: (After a pause) Now give me that question.

(Last question re-read.)

A. Yes.

Q. And the point of safety at which this mechanism which you have just described is set, is one and one half tons more than the machine is supposed to carry; is that right? A. That is right.

Q. (By Mr. Fryer): Can you give us a detailed explanation of how the mechanism which you have just described, comprising the parts 78, 79, 80 and 82, work when the machine is overloaded a ton and a half beyond its capacity and this safety device goes into operation?

Mr. Geisler: If your Honor please, all this goes into claim 5, on which we are not suing. It is immaterial. If your Honor wishes to hear it I—

The Master: What do you claim for the materiality of it?

Mr. Fryer: If counsel is prepared to concede that this mechanism which I am now examining the witness about is completely foreign to the case and is not going to be relied upon by them for any pur-

(Testimony of Carl F. Gerlinger.)

pose in the case, then I think I can withdraw my cross examination with respect to it.

Mr. Geisler: We are suing only on claim 4. It is not a part of claim 4.

Mr. Fryer: And it is your position, Mr. Geisler, that the mechanism just referred to by the witness does not constitute any part of the combination of claim 4?

Mr. Geisler: Correct.

Mr. Fryer: Very well. Then we withdraw the question.

Q. Will you look at your patent in suit, Plaintiff's Exhibit 2, at the point where the reference character 69 is applied in Figure 2 of the drawing. Do you see Figure 2 of the drawings of [328] your patent now? A. Yes.

Q. That is a plan view of your machine?

A. Of what figure?

Q. Figure 2. A. Yes.

Q. The part marked 69 in Figure 2 is also shown in plan view; is that your understanding?

A. I didn't get that, please.

(Last question read.)

Q. Do you know what a plan view is, Mr. Gerlinger?

A. Yes. Yes, that is shown at——

Q. Well, is the part 69 shown in plan view on Figure 2? A. On the side view?

Q. Does Figure 2 show a side view of 69?

A. No. That shows looking at the top. My mind don't work.

(Testimony of Carl F. Gerlinger.)

Q. All right. Then in Figure 2 we are looking down on the top of your machine; is that your understanding? A. Yes.

Q. We are also looking down on the top of the part 69 shown in that Figure 2; is that right?

A. 69, yes.

Q. Now what part of the machine or of 69 is that structure shown in double lines making a U-shape around the end of the lead line extending downwardly from the figure 69? A. Yes.

Q. I say, what is that structure?

A. That is bar 67.

Q. That is all part of the bar 67; is that your understanding?

A. 69 is not a—69 is part of 48.

Q. You mean by that it is integral, moves with 48? A. It is a cam there, yes.

Q. 69 then is a cam on the bar 48; is that right?

[329]

A. 48; that is right.

Q. And what is that U-shaped piece which is shown surrounding the end of the lead line extending downwardly from 69? Is that also a part of 48?

A. No. That is shown—that is 67. You mean the dotted line?

Q. No; I mean the solid line, two lines parallel to each other and forming an inverted U around the end of the lead line extending down from the figure 69. Is that a part of 48 or a part of 69?

A. You mean the——

(Testimony of Carl F. Gerlinger.)

The Master: I don't know whether he understands what you mean by the lead line.

Mr. Fryer: May I go up and show it to the witness, your Honor?

The Master: Yes, if you will be so good, Mr. Fryer. I think if you used the large scale drawings perhaps it would be a little more easily understood.

Mr. Geisler: We have one right here.

The Master: Well, We have one right here. That would show it better, would it not?

Mr. Fryer: I think that would be confusing. It is colored here. We had better refer to the original drawing.

The Witness: This line, you mean (indicating)?

Q. (By Mr. Fryer): Can you see the two parallel lines which I am now pointing to, forming an inverted U surrounding the end of the lead line extending downwardly from the figure 69?

A. This line what you see is lever 67.

Q. You have pointed to a dotted line?

A. Yes.

Q. Whereas I have been pointing to a solid line——

A. And this——

Q. Just a minute: pointing to a solid line which is not dotted, and on the drawings of the patent is only about an eighth of an inch long, making a figure looking like an inverted U at the end of the line 69. [330]

A. No that is a wedge.

Q. That is a what? A. A wedge or a cam.

Q. A wedge? A. A wedge or a cam.

Q. And is that wedge or cam formed on the part

(Testimony of Carl F. Gerlinger.)

48 or on the part 69? A. No; on part 48.

The Master: You mean 69?

Mr. Fryer: Yes, your Honor.

Q. That wedge member or cam member represented by these lines in a U-shape are a part of the lever 48, then; is that correct? A. Yes.

Q. And do they surround the upper end of the part 69 which appears in Figure 2?

A. That is—I mean, Figure 1 shows you more plainly.

Q. I know, but I want to understand Figure 2 and I would like you to state whether or not this wedge construction which you say is a part of 48 surrounds the upper end of 69, which we see in plan on Figure 2 of the drawings?

A. I don't see it. I don't see it. I only see the cam on Figure 2.

Q. Well, will you color with a red pencil, which I will now hand you, everything in Figure 2 which you say is a cam forming a part of the lever 48. May I hold this for you?

(Witness marks as requested.)

Q. Everything which you have now colored in red in Figure 2 of your patent is the cam or wedge formed on the lever 48 of your patent; is that right?

A. Yes.

Q. Is it your understanding that that cam or wedge is designated by the reference character 69?

A. 69; that is a cam, and 69 is the bar 67 with an extended arm, would hit the wedge on the side of 48. [331]

(Testimony of Carl F. Gerlinger.)

Q. Is it then your understanding that the part 69 is wholly different from the thing which you have colored red on Figure 2 of the drawings of the patent?

The Witness: I would like to get that question again, please.

(Last question read.)

A. Well, this don't show plain. It shows more plainer on Figure—I mean on Figure 1. 69 is part of 67.

Q. After seeing it more plainly in Figure 1, as you have stated, will you state now whether or not the part on Figure 2, which you have colored red, is the part 69, or whether it is a part other than 69?

A. 69 makes contact against that lever.

Mr. Fryer: May I have that answer, please.

(Last answer read.)

Q. I was asking you about the part which you have colored red in Figure 2 of your patent, and I would like you to tell the Court whether that part colored red is what you understand to be 69, which you have referred to as better shown in Figure 1.

A. As I—

Mr. Geisler: Just a minute. I will make an objection, your Honor. It strikes me we are taking a lot of time about the drawings when the patent speaks for itself. No matter what the understanding of the witness is, his own specifications and his own drawings tell what it is.

Mr. Fryer: Our point, your Honor, is that the drawing is ambiguous and we are trying to find out

(Testimony of Carl F. Gerlinger.)

how this thing works that we are accused of having taken from this plaintiff, and no one can tell us better than the man himself who created the thing.

Mr. Geisler: In response to that I beg to say this, your Honor; it is understood that all patent drawings are directed to men who are versed in the art. They are not finished drawings. In most every case I have had any experience with, those drawings, if they are to be converted into a machine, have to [332] be taken into a drafting room and drawings made first. It is supposed that the person familiar with the art of reading those drawings knows what to do with them.

Mr. Fryer: Of course we concede that, your Honor, and granting all the latitude we can to a skilled mechanic in reading those drawings we still are unable to understand how the thing works, and unable to understand what we are accused of appropriating. This is the heart of the thing and we are trying to find out how the thing works from the man who made it. I think we are entitled to get this information.

The Master: I think you are entitled to find out how he claims 69, 67 and 48 work. I am going to suggest to counsel, however, perhaps you might be able to find it out more readily if you would ask him that direct question.

Mr. Fryer: Well, I will try it. I have my fears, but I will start it.

The Witness: Well——

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May I have the last question and answer, please?

(The last question was read as follows: "I was asking you about the part which you have colored red in Figure 2 of your patent, and I would like you to tell the Court whether that part colored red is what you understand to be 69, which you have referred to as better shown in Figure 1.")

A. 69 makes a contact on lever 48.

Q. What is the shape of the part 69 which contacts the lever 48?

A. It is a wedge shape, or a wedge shape.

Q. All right. Now looking at Figure 2 of your patent in suit, will you explain how the part 67 and the part 69 work to operate the lever 48, if they do that?

A. When bar 67 raises up 69 will make contact on that wedge and 68 is pivot and will move clutch in neutral position, move that 48 lever, disengage the clutch. [333]

Q. In your last answer you said would make contact with the wedge. What is that wedge in Figure 2?

A. On the side of the lever. It don't show so very plainly.

Q. There is a wedge on the lever 48 which is not shown in the drawings; is that your answer?

A. It is shown but it don't show very plainly.

Q. And you understand that the bar 67 engages that wedge?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. In order to move 48? A. Yes.

The Master: Would I disturb your thought if I ask a question here?

Mr. Fryer: Yes; certainly.

The Master: Is that wedge on bar 48 shown any place on Figure 1?

Mr. Fryer: That was a question to the witness, your Honor?

The Master: Yes.

A. It is blocked in there.

The Master: Immediately to the right of the lower end of the pedal 37?

A. It is right above 68.

The Master: Is that what you mean, the portion marked in there that is blocked in, you say?

A. Yes.

Mr. Fryer: I am afraid, your Honor, you may be confused there. That rectangular bar is an end of the rack bar 21.

The Master: That is what I am trying to find out, whether it is shown any place.

Mr. Fryer: I think I can clear this up now, your Honor.

The Master: All right.

Q. (By Mr. Fryer): Looking at Figure 1, when the bar 67 is moved upwardly does the cam 69, which appears in Figure 1, move to the left of the drawing or toward the left of the drawing?

A. Move that way (indicating). [334]

Q. That is, it moves toward the motor end of the machine shown in Figure 1? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Is it that movement of the part 69 toward the motor end of the machine which moves the lever 48—— A. Yes.

Q. Or is it the upward movement of 69 which moves the lever 48?

A. Well, it is the upper—no; it is the upward movement of bar 67.

Q. Yes; and the cam 69 moves toward the motor end of the machine when 67 moves up; is that right?

A. The cam, the wedge shoves the lever over.

Q. When you say shoves it over, it shoves it towards the top or the bottom of the machine shown in Figure 2? A. Toward the engine.

Q. Toward the engine in the machine as shown in Figure 2? A. Yes.

Q. So, then, summarizing the operation of 67, is it your understanding that when the load hits 67 and moves it upwardly, the parts shown in Figure 2 are such that the end of the cam 69 moves upwardly? A. No; it is sideways.

Q. And pushes the bar 48 over toward the engine? A. Yes.

Q. Or toward the bottom of the figure in Figure 2? A. Yes.

Q. Now is that cam 69 arranged to push the lever 48 toward the engine shown in the model, Exhibit 13 for identification?

A. This is changed (indicating).

Q. When you say "this" you point to the lever overlaying the part marked 67?

(Testimony of Carl F. Gerlinger.)

A. Yes; this is changed. This lever is operated with this set screw; 67 raises against 70 and moves in neutral position. [335]

The Master: Moves 70 into neutral position?

A. Yes.

Q. (By Mr. Fryer): The cam 69 of the patent is not on the model, 13 for identification?

A. No, no.

Q. Do you know the defendant in this case, the Clark & Wilson Lumber Company, of Portland, Oregon? A. Yes.

Q. In fact, you sold the defendant Clark & Wilson Lumber Company two of your hydraulic carriers in 1923, did you?

A. Mr. Fryer, I wouldn't say 1923. I don't remember if it is, but it is about that time.

Q. You or your company, the plaintiff here, did sell Clark & Wilson Lumber Company two of your hydraulic carriers, though, did they? A. Yes.

Q. And as nearly as you can recall, that was about in the year 1923 or '24?

A. I would say about. Well, about '23 or '24.

Q. Where did those two hydraulic carriers go that you sold to Clark & Wilson Lumber Company? To their plant here in Portland?

A. At Linnton.

Q. Linnton, on the outskirts of Portland?

A. Yes.

Q. Did you ever go to the plant of the defendant Clark & Wilson Lumber Company in connection with the sale of those hydraulic carriers to it?

Mr. Geisler: If your Honor please, Mr. Gerlinger is suffering from a severe attack of asthma and he is not able to proceed at this time.

The Master: Well, of course, it was very evident this [336] morning that he was suffering considerable disability. You may proceed with the case. You expect him to be ready by tomorrow?

Mr. Geisler: He will be ready by tomorrow morning. He did not sleep a wink last night.

The Master: You may proceed with the case. You may continue his examination on his return.

HENRY NOEL DIMICK

was thereupon produced as a witness in behalf of the plaintiff herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. Henry Noel Dimick, Dallas, Oregon.

The Master: Take the stand.

Q. (By Mr. Geisler): What is your present occupation?

A. Mechanical draftsman and mechanic.

Q. Just kindly talk a little louder.

A. Mechanical draftsman and mechanic.

Q. Are you in the employ of the plaintiff here?

A. I am.

Q. When did you enter that employ?

(Testimony of Henry Noel Dimick.)

A. First at February 1st, 1923.

Q. What experience have you had in general along mechanical devices and mechanics?

A. Well, I have had considerable experience. Early in life, I believe at about the age of seventeen I began activities which connected me very closely with mechanical devices of various kinds.

Q. You heard the testimony here with regard to lumber carriers which were built at the plaintiff's shop at Dallas, Oregon? [337] A. Yes.

Q. The four machines that were referred to as numbers 1, 2, 3 and 4? A. Yes.

Q. Tell us what you remember, if anything, particularly about machine number 1?

A. Well, I remember a great deal about the mechanical construction of that particular machine.

The Master: What was that answer?

A. I operated this machine number 1 at various times at the Willamette Valley Lumber Company in Dallas and was more or less familiar with its mechanical construction.

Q. (By Mr. Geisler): State whether or not the construction of that machine was as shown in the drawing here of plaintiff's patent, Exhibit Number 2?

Mr. Fryer: We object to that on the ground that no foundation has been laid.

The Master: Sustained.

Q. (By Mr. Geisler): Are you familiar with the plaintiff's patent, Exhibit No. 2, known by the Number of 1457025?

(Testimony of Henry Noel Dimick.)

A. Yes, I have observed that patent. I am familiar with it.

Q. You have read it through, have you?

A. Yes, I have read the patent through.

Q. Are you conversant with the reading of patents?

A. Well, to a certain degree I am. I have read a good many patents, in fact.

Q. Now, will you state whether this machine, this lumber carrier, which you refer to as number 1, which you operated, was similar to, or not, to this patent Exhibit number 2?

Mr. Fryer: We object to that, if your Honor please, on the ground that the foundation laid shows that this witness has not the requisite capacity to advise the court with respect to the subject matter on which expert testimony is permissible in a [338] cause of this kind. He is a witness in this capacity supposed to have more than a passing ability to read a patent. The Court has that ability and a good deal more, and unless the witness is one who is peculiarly fitted in knowledge, training and experience to explain more than the ordinary ambiguity and difficulty in a patent drawing his opinion on the subject matter inquired about is not competent, and we object to it on that ground.

Mr. Geisler: If the Court please, any mechanic who is able to read drawings surely can describe whether he understands a device and whether another device which he is asked to look at——

(Testimony of Henry Noel Dimick.)

The Master: I am going to sustain the objection, not upon the ground given, but because the answer called for I don't think would be of any particular aid to the Court. You have your patent. He knows the machine. He can describe what was in the machine that is in the patent and what is in the patent that was not in the machine.

The Master: I will permit you to have this witness have before him there the drawings and the specifications and to describe the machine which he saw and operated, in detail, so that we can follow it—so that I can follow it along and see whether or not the machine which he operated was in fact a machine drawn along the drawings and specifications of this patent.

Mr. Geisler: I will ask that the bailiff present to the witness Exhibit No. 2. As I understand, you have studied that patent and are familiar with its description and illustration? [339]

A. That is correct. I have.

Q. Do you find in that patent a reference to the load-lifting means? A. I do.

Q. Will you describe to the Court what those load-lifting means consist of?

A. A load-lifting means is any——

Q. (By Mr. Geisler): I ask you to describe whether the load-lifting means are shown and described in this particular drawing and description of that patent, do you see?

A. Well, in this do you want me to make reference to different members?

(Testimony of Henry Noel Dimick.)

Mr. Geisler: If the Court please, before the witness testifies may I introduce those three enlargements as exhibits in behalf of the plaintiff?

Mr. Fryer: Are they photostatic enlargements?

Mr. Geisler: They are photostatic enlargements, yes. They are photostatic enlargements of the patent drawings as contained in the patent.

Mr. Fryer: We have no objections to those photostatic enlargements, your Honor.

The Master: Thank you. The last number I have is 25 for identification.

Mr. Fryer: That is right.

The Master: Figure number 1 will become Complainant's Exhibit 26; Figure No. 2, Complainant's Exhibit 27; figure number 3, 4 and 5 on
(The three photostatic enlargements referred to were thereupon received in evidence and marked Complainant's Exhibits 26, 27 and 28.)

[340]

The Witness: Mr. Geisler, do you want me to follow it as described in the drawing by reading the patent and referring to the numbers?

Mr. Geisler: Yes; any way you want to. Be sure not to stand in the way of the Court while describing it.

The Master: I will follow you. Go right ahead.

A. First, I will ignore the description in the patent and I will go ahead with this just from my own memory.

(Testimony of Henry Noel Dimick.)

Q. (By Mr. Geisler): You have a right to refer to the patent if you want to.

A. I will if I feel it is necessary.

Q. Yes.

A. In this lumber carrier lifting device, first off the power is taken from a source through shaft 46.

Q. How is that source indicated?

A. The source here on the drawing is merely indicated by a pair of apparently miter gears.

Q. I will ask you to mark those by pencil, if you will, so that we know what those miter gears are.

A. Those are beveled or miter gears.

Q. I mean, just as a reference character, with pencil, to which we can refer.

A. Well, we will call those miter gears No. 1 then in pencil. Will that be all right?

The Master: No, because you are using other numbers. Use letters, A, B, and so on.

A. I give these miter gears reference character "A".

Q. A. Proceed.

A. From this apparent source of power—I should say the power is transmitted from this source through the shaft 46 to the clutch 47. This clutch, through a pair of worm gears, or a worm and [341] worm gear, carry power to shaft 50, which is longitudinal or a fore and aft shaft extending practically to the wheel base of the lumber carrier.

(Testimony of Henry Noel Dimick.)

A. This shaft extends for the length of the carrier practically to compare with the wheelbase. In other words, it runs nearly the extent of the frame. At each end of this shaft 50 are a set of worm gears through which the shafts 52 and 53 are caused to rotate.

Q. Are those worm gears indicated by any number?

A. Yes, I believe the worm gears are indicated by the number 51, but we will refer to the patent here to see if that is correct.

The Master: That is correct.

The Witness: It is correct? Thank you. On each of these—on either end of these shafts 52 and 53 are ordinary pinions, pinion gear, which mesh with racks, four racks, all carrying the number 56.

Q. (By Mr. Geisler): What are the numbers of those pinion gears that you refer to?

A. 54 and 55, the pinion gears at the front of the machine being numbered 54 and at the rear of the machine 55.

Q. Proceed.

A. Let's see. I have mentioned the racks, 56, haven't I? Attached to the lower end of the racks 56 at each corner of the machine by links—I don't find any numbers indicating this bar here.

Q. What bar are you referring to?

A. This bar right here that fastens onto the bottom of 56. 56 is here, but I don't find any number indicating this short coupling bar here. However, it

(Testimony of Henry Noel Dimick.)

is just a connecting link, which I think is very immaterial in the general construction of the machine. It could be round or square or flat, or whatever desired type to fit in with this mechanism.

Q. You are now talking about Figure 5—Figure 3? [342]

A. I am referring to the drawing, Figure 3, merely to find if there was a number to this coupling link. But, at any rate, at the lower end of this rack, these racks 56, of each of the racks 56, is a shoe or hook and it is designated here, the actual shoe is 59 on Figure 3.

Q. You might explain briefly how those shoes in conjunction with the rack bars 56 work.

A. Here on the drawing it shows member 62 is a roller fastened to the leg of the carrier frame, fastened in to the leg of the carrier frame. No. 60 are pins—I am afraid I will have to refer to the patent. I prefer not to make an error.

The Master: This part of the device is not in question here?

Mr. Geisler: No, your Honor.

The Master: What actually happens is, as that lowers the spring 60 pushes the shoe back, as it is brought up that part of the carrier frame pushes that shoe back into place; isn't that it?

Mr. Geisler: That is right.

The Master: That is all.

The Witness: That is correct.

(Testimony of Henry Noel Dimick.)

Mr. Geisler: You don't have to go into that, then. I just thought your Honor would like to understand it.

The Witness: Well, in that manner there is a more or less direct connection of the lifting device with the load lifting or grabbing members. Now we get back to Figure 2, I think is the best, and also Figure 1. We will refer to hand lever 70, which is shown here in red, and in this one in red.

The Master: Shown in Figure 1 in red and in Figure 2 in red? A. Figure 2 in red.

Q. (By Mr. Geisler): What happens in the rotation, referring to Figure 2, for example, of the shafts 50, 52 and 53 in either direction?

A. Taking into consideration those, this worm mechanism driven through this reversible clutch 47 by action of levers not previously described may be made to rotate in either direction. This [343] shaft 50——

Q. If it rotates in one direction what happens?

A. In one direction the load or the lifting members would be lowered.

Q. In the other direction?

A. And in the reverse direction they would be raised.

Q. You may proceed.

A. Now this lever 70 is provided as a means by which the operator may control the lifting device.

Q. You are referring now to Figure 1?

(Testimony of Henry Noel Dimick.)

A. I am referring to both Figure 1, 70 on Figure 1 and 70 on Figure 2, which are the same lever. As I said, this lever 70 is a member by which the operator controls the lifting device.

Q. In what sense does he control it?

A. Why, he just manipulates it by hand; by pushing the lever in one direction or the other he is able to control the lifting device insofar as raising and lowering the shoes or bringing the clutch to neutral position, or throwing the clutch into raising or lowering position.

Q. The clutch is the medium through which the control is exercised?

A. The clutch is the medium which governs the direction of the hoist, or is disengaged or engaged to place this mechanism in motion.

Q. Proceed.

The Witness: Just what was my last in the description there?

(Thereupon the previous answer of the witness was read as follows: "I am referring to both Figure 1, 70 on Figure 1 and 70 on Figure 2, which are the same lever. As I said, this lever 70 is a member by which the operator controls the lifting device.")

The Witness: Well, in order to move the shoes in one or the other direction the operator would push the lever until it en- [344] gaged any one of the three notches, any one of the two notches, either

(Testimony of Henry Noel Dimick.)

71 or 73, and I forget just the technical name that is given in the patent.

Q. What are the notches for?

A. They are just merely a stop or an indicator of the position of the lever, or to hold it in that position in case the driver would release it.

Q. Are they provided in any particular part—those notches.

A. These notches are just on a bar that is fastened to the front of the seat.

Q. Go ahead.

A. Well, to operate these shoes in either the raising or lowering direction, one of these directions, he would place the lever in one of the notches 71 or 73. Say that he placed it in 73 to lower the mechanism, lower the lifting; well, when he placed this lever in notch 73 that would engage this clutch and cause this worm gear to rotate in a direction that would move the shoes downward or toward the ground. Then at such time as the shoes reached a predetermined extent, traveled a predetermined extent in the downward direction, an automatic device is provided which will stop the shoes before they actually strike the ground, the wharf, or wherever the carrier happens to be operating.

Q. Point to those automatic devices in reference to the shoes.

A. Well, in this particular instance I will refer to Figure 3. At the top of the right rear rack bar 56 is a bracket. There is a bracket on top of the

(Testimony of Henry Noel Dimick.)

rack bar and fastened to it, through which passes a set screw 65. As the lifting shoes reach the lower limit of travel this set screw 65 engages a bell lever 66, the outer end of the bell lever is moved downward, causing the other arm of the bell lever to move in a direction which will move the clutch to neutral position, thus disengaging the clutch and moving this lever at the same time to the central notch 72. [345]

Q. Is that lever 70?

A. Lever 70 to notch 72, the center notch. Now as this occurs, as this lever is moved to the central position, there is a cam arrangement on a bar 74—I believe that cam arrangement in the bar 74 is shown in Figure 4 on the larger drawing Figure 3, and I would take it that this 74 indicates the connecting bar which connects the cam 75 with the lever 48, which is shown in red very distinctly on Figure 2. The movement of this lever 70 in the direction I have described as from the notch 73 to the notch 72, speaking of the lever 70, would also move this mechanism, such as 74 and 75, in the same direction.

Q. What would be the effect of such movement? What would it do?

A. Well, I am just getting to that. I am just trying to find the proper numbers—where they are located on these drawings. There is a brake arm 76 which on its under side is also supplied with a cam. Now I don't find a cam shown on this patent draw-

(Testimony of Henry Noel Dimick.)

ing but regardless of whether there is a cam there or not if this lever 75 was in a position where it didn't engage the bottom of lever 76, or it was disengaged with the higher points of the cam on that lever, the action when this lever 70 and 48, and connecting with the bar 74 carrying the cam 75, would move in that direction, these cams would contact at their higher point and raise the bar 76 and apply a brake to the shaft—a continuation of the shaft 46, which extends clear through to the outside—would apply a brake to a pulley wheel on the end, or a brake mechanism on the end of the shaft 46, on its outer end. Now that would constitute stopping the lifting mechanism by automatic means in downward position, or in the downward travel of the racks and lifting shoes.

Q. What would happen if the rack bars were moved in the opposite direction?

A. In this particular drawing if the rack bars—the reverse action of what I have described would be to put this lever in notch 71, which would put the cam I have described on the other [346] side of this lever, brake bar 76, and would engage the clutch in the reverse direction of what I have previously described; also cause the shafting 50 through the action of the worm and worm gear described, to rotate in the opposite direction, which would, through connection to the various shafts, move the shoes in the upward direction or lifting motion. In the case of the drawing shown, which I find doesn't

(Testimony of Henry Noel Dimick.)

thoroughly coincide with the description in the patent I was just reading, but, however, we will go ahead and describe that, these bars or shoes move in the upward direction—well, we will say with a load. Now if you had a load on cross members or bolsters, which are usually used on which to stack lumber, or other packages, with a load in the device, these shoes would move upward until the load struck this lever or bar 67, which extends across the frame on its underneath side, shown very plainly in Figure 3 and in Figure 1. It is shown in yellow there.

Q. What then happens?

A. I was getting to that. Just a minute until I get myself kind of straightened out here so I can put it so the Court will understand it. The load in coming upward would engage this bar 67 and raise it upward toward this underneath side of the carrier frame. The effect then, as this bar came up, would be, of course, in a pivot—I believe that is called a pivot, or it is a hanger, or it really is the shafting there, I believe, but it doesn't show plainly on the drawing; but, at any rate, this part is pivoted at 68.

Q. You are pointing on Figure 1 now?

A. Yes, 68 on Figure 1. Well, in the patent this 69 I believe is described as a bar with a cam-shaped upper end. That cam-shaped upper end of that bar in coming up would engage—well, I see now that I have got my action reversed on which would be the

(Testimony of Henry Noel Dimick.)

raising and lowering, but we will say, anyway, just suppose this lever would be on the other side, or we can reverse the action, [347] we will say that the raising direction really does put this lever over in 73, that would put this lever 48 in that direction. I believe it is shown here.

Q. In what direction would you say, right or left?

A. It would be the right hand direction.

The Master: Right hand to one sitting in the driver's seat?

A. Yes, right hand to one sitting in the driver's seat. And in this case that cam-shaped upper end, which cam may be described in different categories—there are various types of cams, in fact, but in this case I think this cam would be—the patent drawing doesn't show anything definitely about it but as a mechanic and one who has had some experience along those lines, if I were going to construct a machine of this kind and try to follow this description more than the drawing itself, which doesn't show in very great detail, I would build that cam in a sort of a wedge shape, perhaps a sloping top and short straight section at the upper end of this lever here. I believe that is shown something in that order right here. There is a cam on this (indicating)—

The Master: Referring to what?

A. Referring to Figure 4 on the large drawing as Figure 3. It is really Figure 4 in the patent

(Testimony of Henry Noel Dimick.)

drawings. That cam on the upper end of this bar referred to as bar 69, with the cam-shaped upper end and shown more distinctly in its particular arrangement in Figure 1, would engage the side of this lever 48 and perhaps some device put there to, oh, provide for wear and so on, but, however not shown in the drawing. It shows a plain lever there. And in doing that this bar coming up would undoubtedly move this lever 48 in the direction opposite to the contact of the cam. In other words, this cam came up underneath it. It would certainly, if it was shaped as a wedge and with a sloping top, and coming out like that (indicating)——

The Master: Go ahead. Don't pay any attention to me. [348]

A. (continuing) —would undoubtedly move this lever 48 toward the center of the machine or toward the left and bring the lever 70, with the various connections, to the center notch 72, which would bring the clutch to neutral position, disengage the clutch and apply the brake. As shown in this drawing that would be the action with a load. Now to go further than that, according to the description of the patent, which describes a means for stopping,—for bringing the clutch to neutral position or disengaging the clutch and applying the brake when the load lifting means have traveled to a predetermined extent in either direction, I believe that that is a correct——probably not in every word, but it

(Testimony of Henry Noel Dimick.)

is a correct description as given in this particular patent of '025.

Q. (By Mr. Geisler) In what particular paragraph of the patent do you find such a statement? Designate it by page and line.

A. I will have to locate it, because I don't remember just where it was. If there is anyone there that has it they can help me by just telling where it is.

Q. Let me call your attention to page one, line 18.

A. Line 18, page 1; all right. Yes, I have read that particular part of the description. Now is it desired that I go ahead and describe what would take place if this——

Q. Well, is that it? I didn't get whether you had reference to that.

A. That is the description I have reference to. It describes an operation there in the patent that I am unable to follow on this particular drawing, as the means to stop—"Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake mechanism." Now if they refer to something as being lifted with a load, I have described that, but if this means the particular limit of move- [349] ment in either direction, now I would like the advice as to

(Testimony of Henry Noel Dimick.)

what I am to do regarding that particular description as far as these drawings are concerned.

Mr. Fryer: We object to any leading or instructing of the witness by counsel. If questions can be put that are not leading it would be a proper method of examination, but certainly the witness is not to be instructed while testifying by counsel as to what to say.

The Master: Well, the counsel may direct the witness' attention to a particular part of the patent and ask what will happen if a certain operation is conducted or what will not happen, certainly.

Mr. Fryer: I have no objection to that sort of an examination, your Honor.

The Master: Let me see if I understand the inquiry of the witness. Am I right in saying that the device shown by the bar 67, or cam at the end of one branch or arm of that bar 67, upon the load being lifted, would throw the lever 48 into neutral?

A. That is correct, yes.

The Master: And engage the cam, or the cam on 74, so as to engage the brake or give braking effect.

A. Yes, that would engage the cam and apply the brake, as described, whenever this——

The Master: But the difficulty you are having, as I understand it, Mr. Witness, is that that particular device does not have any effect upon the downward movement of the rack.

(Testimony of Henry Noel Dimick.)

A. Now you are speaking of this particular device here (indicating)?

The Master: No. I am speaking about this cam on 69.

A. That has no effect on the downward movement. That is correct.

The Master: So it would have effect only on one movement [350] and you would need another device to take care of the other movement?

A. No. I have already described the device to take care of the other movement, the downward movement.

The Master: Which is the bell arm?

A. Yes, that is correct.

The Master: Which is 66, isn't it, or 56?

Mr. Fryer: 66.

The Master: 66. All right. Now have you any questions?

Q. (By Mr. Geisler) What is the purpose of the brake in a device of this kind?

A. The purpose of the brake in a device of this kind is that with these various members contained in this reversible clutch they are often quite heavy and they carry quite a bit of centrifugal force as they rotate, and the brake is of great assistance, for one thing, in stopping the rotation of that shaft and providing a device for control. Another purpose of that brake is that these lumber carriers operating on ordinary lumber docks or roads set up con-

(Testimony of Henry Noel Dimick.)

siderable of a vibration going over bumps, and so on, and the loads in lumber carriers would be inclined to settle and cause a sort of a reverse action through gravity in the lifting device, and as long as this brake is applied it is sufficient to keep the load from settling under those conditions.

Q. (By Mr. Geisler) Now with information that you got from the drawings and specifications here would you, as a mechanic, be able to build a lumber lift which embodied these features which you have testified about?

A. I would be able, from the drawings, used in connection with the description, I would be able to build the lumber carrier, taking the description and the drawings as a whole. [351]

Q. The Court asked of me that he would like to have quite specific information with regard to the operation of that lever 48. Now if I asked you to build a lumber carrier of that kind and wanted you to make a detail of the parts cooperating with lever 58, could you do it? A. I could.

The Master: Lever 58?

Mr. Geisler: Lever 48, your Honor.

Q. Did you make such a sketch?

A. I could make a sketch so that the average mechanic or workman would be able to construct that mechanism, yes.

Q. Well, did you make such a sketch at my request? A. I made such a sketch.

(Testimony of Henry Noel Dimick.)

The Master: I think perhaps counsel misunderstood me. The thing that was not clear in my mind was the 69 and 67, how that would actuate lever 48. But the witness has already explained that and I think I have a clear idea of it now.

Mr. Geisler: I have a sketch here.

The Master: Very well.

Q. (By Mr. Geisler) I will ask you to look at this sketch and state whether or not that is a detail of your conception of the mechanism shown by the patent drawings regarding lever 48 and the cooperating parts.

A. Yes, that is a sketch that I made, free hand sketch, just showing briefly what the principle of operation would be.

The Master: Mr. Geisler, if it will not disturb you, some time ago, Mr. Dimick, you were indicating on Figure 4 what I understood you to say was the cam, cam-shaped end on lever 67 which would contact with and move lever 48. Now will you take a pencil and indicate on Figure 4 where this cam-shaped upper end of 67 is shown, and mark that "C".

A. That would be this I was referring to on Figure 4, saying that I believed that this arrangement right here was the cam [352] described as being the upper end of the bar on bar 69 shown on Figure 1, and I believe that is what the draftsman who made these drawings intended this to be, this cam.

(Testimony of Henry Noel Dimick.)

The Master: Just mark that in pencil "C", with a lead line out from it.

(Witness marks as requested.)

Q. (By Mr. Geisler) Did you see a lumber carrier which was built substantially as shown by the patent, Exhibit No. 2 here?

Mr. Fryer: That is objected to, if your Honor please, on the ground that it is indefinite and uncertain, not specifying the time or place.

Mr. Geisler: Give me a chance to ask the question.

Mr. Fryer: I beg pardon. I thought you had completed your question.

Mr. Geisler: No. If you will, wait a moment. The first question, I would like to know whether he did.

Mr. Fryer: That is the question I object to, if your Honor please, on that ground.

The Master: Overruled. Answer.

A. I did see the lumber carrier.

Q. (By Mr. Geisler) Where and when?

A. Why, mainly at the Willamette Valley Lumber Company mill in Dallas, Oregon.

Q. At what time?

A. Well, it was in the latter part of 1922 or the early part—I am not just sure on the date.

Q. Was the lumber carrier there at that time?

A. Yes. It was in 1922 that I saw it there. Yes, the lumber carrier was there.

Q. Had you anything to do with that lumber carrier?

(Testimony of Henry Noel Dimick.)

A. Oh, when I first observed the machine there and saw it there I was interested in the operating of these machines and I used to relieve the driver, the regular driver there sometimes for a half hour or hour in order to become familiar with this type [353] of machine; that is, when the machine was first put into operation, or during the first part of the time it was in operation by the Willamette Valley Lumber Company.

Q. You were present in court this morning and other times and heard about machines numbers 1, 2 and 3 manufactured by plaintiff corporation. Which machine was that?

A. Well, I think that this—according to the conversation and questions asked in court I believe that that was—I am sure that that was the number 1 machine, what they refer to as the number 1 machine.

Mr. Fryer: We move to strike the answer on the ground it is the witness' conclusion and opinion based upon an interpretation of the record in this cause, completely without any foundation of any knowledge on the witness' part.

The Master: Sustained. But you may have your answer stand over the Master's ruling, if you desire.

Mr. Geisler: If you please.

The Master: All right. Both counsel understand in any matter they may do that.

Mr. Fryer: Yes.

(Testimony of Henry Noel Dimick.)

Q. (By Mr. Geisler) You were present here in court and heard the description by Mr. Gerlinger of what he called No. 1 machine? A. Yes.

Q. Now with reference to that description what do you say this machine was?

Q. Mr. Fryer: I think that is subject to the same objection, if your Honor please.

The Master: Let me have that question again.

(Last two questions read.)

Mr. Geisler: If your Honor please——

The Master: I get your point.

Mr. Geisler: It was testified here——

The Master: The objection will be overruled.

The Witness: Would you read that question again, please. [354]

(Last question re-read.)

A. This machine was the number 1 machine.

Q. (By Mr. Geisler) You were present in court and heard Mr. Gerlinger speak of number 2 and number 3 machines, which were some mechanical change from this patent drawing and description, were you? A. I heard that, yes, sir.

Q. I call your attention to Exhibit No. 6. Did you at any time see a lumber carrier having lifting mechanism and controls therefor as shown in this Exhibit 6?

Mr. Fryer: Now may I have that whole question at once, if your Honor please?

(Last question read.)

(Testimony of Henry Noel Dimick.)

The Master: You may answer the question.

A. I did, yes.

Q. (By Mr. Geisler) When and where?

A. First at the—the first time that I saw these carriers they were at the plant of the Dallas Machine & Locomotive Works in Dallas, Oregon.

Q. At what time?

A. Well, I am unable to place that exactly, but it was about, oh,—well, it was the latter part of—well, I would say it was the first part of the year 1922.

Q. What was the occasion of you seeing that?

A. Well, these two machines, or this one machine, I should say, of course in connection with another machine, were being built by the Dallas Machine & Locomotive Works at their plant in Dallas.

Q. Did you know where those machines were going?

Mr. Fryer: We object to that, if your Honor please, as wholly beyond any foundation laid with this witness. He went to work for the Dallas Machine & Locomotive Works in February of 1923, according to his testimony, and this is a series of events that took place in 1922, and now he has asked if he [355] knows where the plaintiff intended to send these machines. There is utterly no foundation for any knowledge of his own as to those facts. We object to it on that ground.

(Testimony of Henry Noel Dimick.)

Mr. Geisler: The witness can state if he knows whether he knows; if he doesn't he doesn't.

The Master: Well, could his knowledge be other than hearsay?

Mr. Geisler: No, positively not.

Mr. Fryer: Well then, we object to it on the ground it is also hearsay.

Mr. Geisler: No, I don't say it is hearsay. I say that he knew of it.

The Master: Let me hear the question.

(Last question read.)

The Master: You may answer whether you did or did not.

A. I did know where the machines were going.

Q. (By Mr. Geisler) How did you come to know it?

A. Well, I had been promised a job driving one of these machines at the Cobbs & Mitchell Lumber Company in Valsetz, Oregon, and from that I am pretty certain that must be where they were going.

Mr. Fryer: Now we move to strike the testimony concerning those machines on the ground it is purely hearsay, a conclusion and opinion of the witness on a fact question.

The Master: Sustained. The motion to strike will be sustained, but you may have the answer notwithstanding the ruling, if you want it.

Mr. Geisler: No.

(Testimony of Henry Noel Dimick.)

Q. Did you afterwards see those machines at the Cobbs & Mitchell Lumber Company?

A. I saw those machines at the Cobbs & Mitchell Lumber Company, yes.

Q. Were those machines, as far as the hoisting mechanism, load hoisting mechanism and the controls therefor, identical as [356] shown here by Exhibit 6? A. Yes, they were.

Q. Is there any circumstance which particularly fixed in your mind the identity of one of these two machines that went up to Cobbs & Mitchell Lumber Company? A. Yes, there are.

Q. You may state them.

The Witness: May the Court please, am I allowed to ask a question in order to straighten myself out on this question?

The Master: If you don't understand it you may ask a question.

The Witness: Well, first I want that question read, please.

(Last two questions read.)

The Master: He wants to know whether there are any circumstances that enable you to fix the identity.

The Witness: Yes, but he said one of the two machines?

The Master: Yes.

A. Well, soon after I started driving lumber carriers at Valsetz one afternoon a crew of car-

(Testimony of Henry Noel Dimick.)

loaders who were loading a gondola car got the car finished and it was in the way of other material that was to be loaded, other lumber, and the car had to be moved and this group of carloaders, under the direction of one Major Leland, who was manager there at that time, moved the carrier by using one of these carriers——

The Master: Moved the what by using one of these carriers——

A. They moved the car, the gondola car on the track, by the use of one of these carriers and a push pole or gill poke; I think push pole is the more common term. Several trials with the carrier were necessary before we could get the car started moving, and we had to drive away from it and bump the pole, and so on, and then shake the car loose, and during this starting of the car, why, the man who was holding this push pole got nervous or something and he missed his aim and struck the carrier above the frame and damaged some of the [357] parts of the automatic stop, and also caused some damage to the right rear worm housing, which would be as shown on—well, take this drawing, it is this worm housing here (indicating).

The Master: Referring to Exhibit 6?

A. Referring to Exhibit 6, yes.

Q. (By Mr. Geisler) Where did this happen, please? Where did this happen?

(Testimony of Henry Noel Dimick.)

A. At Valsetz, at the mill at Valsetz, Oregon, of Cobbs & Mitchell Lumber Company, on their docks. Some time either that evening or later, I don't remember—it seems to me it was that night, because the work was done as I remember after darkness—parts were brought from the plaintiff's shop, Dallas Machine & Locomotive Works, in Dallas, to make repairs.

Q. Who brought those parts?

A. As I remember, Mr. Grab brought them up. I think that is one of the first times I met Mr. Grab. In fact, I do remember quite distinctly of him being there, and I assisted him in the work. And some of the holes drilled for fastening those new parts to the carrier had not been supplied, or weren't in the proper places, and in order to get the carrier working properly, why, it was necessary to do some more drilling and I located the parts in their position and marked the holes and then took the parts in to the mill shop and did the drilling, and that is one of the instances which recalls parts of this mechanism to my mind.

Q. Did you see number 2 and number 3 carriers at the plant of the plaintiff?

A. Yes. Shortly before they were delivered I went over there in the company of the driver of the number 1 carrier for the Willamette Valley Lumber Company, and looked at these carriers.

(Testimony of Henry Noel Dimick.)

Q. Do you remember whether or not at that time any photo was taken of those lumber carriers?

A. Well, at the particular time I made this visit in company [358] with the driver I don't think there were any photos made at that time but later on I happened down there just at a time when a photograph was being taken of these carriers.

The Master: Mr. Geisler, for the time being if the witness is not going to have to refer to these exhibits he might take a seat there.

Q. (By Mr. Geisler) I will ask the bailiff to show this photograph to the witness. By looking at that photograph does that bring any circumstance back to your mind? A. It does.

Q. Where was that photograph taken?

A. It was taken at the Dallas Machine & Locomotive Works, in Dallas, Oregon.

Q. When, about?

A. Oh, I would say it was, as I remember it, in the early part of 1922.

Q. Do you recognize some of the people that are appearing in that photograph?

A. Yes, I recognize quite a number of them.

Q. Mention those that you do recognize there.

Q. Well, beginning with the group standing on the ground, the man standing at the front on the left with his hand on his hip, is Nels Anderson.

Q. That is the man with his arms akimbo?

A. Yes.

(Testimony of Henry Noel Dimick.)

Mr. Fryer: If the Court please, I may suggest if the purpose of this examination is to lay any foundation for the offering of this photograph it may all be dispensed with, because I have no objection to the photograph. It is wholly immaterial to any issue. If it is taking time to lay a foundation I will waive it and it may be offered.

Mr. Geisler: Fine. I want to show that those are the two [359] machines that the witness saw at that particular place.

Mr. Fryer: Offer them for that purpose, then. I have no objection. It will save time.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 29.)

Mr. Fryer: I make no objection to this photograph, either, Mr. Geisler, so far as its authentication is concerned. My only objection is that it is wholly immaterial, but I will waive that one also, if you want to offer it.

Mr. Geisler: I offer this in evidence, your Honor.

The Master: It will become Complainant's Exhibit 30.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 30.)

Q. (By Mr. Geisler) Who made that drawing perspective, Plaintiff's Exhibit 6?

(Testimony of Henry Noel Dimick.)

A. I made the drawing, Exhibit 6.

Q. From what did you make it?

A. I made it from the lifting mechanism taken from a carrier that was set up in the Dallas Machine & Locomotive Works' shop, or in a room just adjoining the drafting room at Dallas, Oregon.

Q. From what machine was that particular lifting mechanism obtained?

A. I understand it was from the machine, I believe number 4.

Q. State whether or not the lifting mechanism from which you made that Exhibit No. 6 is identical with the lifting mechanism which you saw in Carriers Nos. 2 and 3.

The Witness: May I have the privilege of asking another question of the Court?

The Master: Yes.

The Witness: Now in view of some things that have happened in court, I just want to ask, when I make these answers do such fine details as the size of bolts, and whether a cam is shaped [360] as a wedge or round member, offset to a shaft, or something like that, or hammer marks, or things like that, do they change the detail of the drawings according to the Court, or is it just in general the way this machine was set up? Is that what you mean?

Mr. Geisler: In substance, yes.

The Witness: In substance, yes.

Q. Substantially the same thing?

(Testimony of Henry Noel Dimick.)

A. In substance I answer yes to that question.

Q. I show you a photograph here and ask you to state what that is.

A. That is the lifting mechanism as set up in the room near the drafting room at the Dallas Machine Works, from which I made this perspective drawing.

Q. Exhibit No. 6? A. Exhibit No. 6.

Mr. Geisler: Any objection to that?

Mr. Fryer: No.

The Master: Are you offering it?

Mr. Geisler: I am offering it, your Honor.

The Master: It becomes Complainant's Exhibit 31.

(The photograph referred to was received in evidence and marked Complainant's Exhibit 31.)

Q. (By Mr. Geisler) Now by referring to Plaintiff's Exhibit 6, state the parts you find in Plaintiff's Exhibit 6 which are similar to the parts in the patent drawings of Plaintiff's Exhibit 2; similar in function, I mean.

A. Yes. Well, beginning with the lever 70, which in the operation of the hoist is the primary member or the hand lever which has those three notches 71, 72, 73, to provide for its control, those are as described, materially as described and shown in the patent drawings. Also this lever is materially as described and shown.

(Testimony of Henry Noel Dimick.)

Q. When you point to the parts describe them.

[361]

A. Lever 70.

Q. That is what number?

The Master: 70, he said.

A. Is materially the same. I might say that on the lift, the photograph of the lift in that particular photograph there, that this lever don't bend over; this lever is not shown bent over in this direction; but the reason in making these drawings I put the lever just straight is the fact that—may I ask again, would I be permitted to mention——

The Master: Go right ahead.

A. I made two other views of this same mechanism, showing this lever in two positions other than this one, which is neutral position. In order that it would be clearer to read this drawing and show more clearly, in making the drawing I didn't put that bend in the lever, but otherwise this lever represents quite distinctly the hand lever 70 mentioned in the patent and shown on the patent drawings.

Q. (By Mr. Geisler) May I interrupt you a moment? Do I understand you made two other drawings? A. Yes.

Q. Which show that lever in other positions?

A. Yes, they show it in other positions, but in order to answer the question as you put it, just

(Testimony of Henry Noel Dimick.)

those that compare, I wouldn't need to have the other one set up.

Q. Very good.

A. If it will save any trouble.

Q. Interrupting you once more, there are certain numbers which are reference numerals on that Plaintiff's Exhibit 6. With what, if anything, do those numbers correspond? With what, if anything, do they correspond? A. These numbers?

Q. Yes.

A. They correspond to the levers, the operating levers shown under the numbers, the reference numbers 70. These notches [362] compare with the notches 71, 72 and 73 shown in the patent drawings of '025. This lever 48 as shown by this leader here represents materially the same structure as shown by lever 48 shown in the patent drawings of '025. This bar here—on this drawing I haven't given it a number—would take the place of this, what I imagine is, and the letter here would indicate is, the bar of connecting link 74 on Figure 3 of the patent drawings. Now Figure 4 of the patent drawings and on the enlarged model Figure 3: This clutch shown in the orange would be the reversible clutch mentioned in the description and shown on the patent drawing, and as the cone which on this doesn't have a number, and the shafting member, shafting part and other devices there that compare with the parts mentioned in the description and on

(Testimony of Henry Noel Dimick.)

the patent drawings. This housing contains a worm gearing 49, which is mentioned and shown in the drawings of '025, and I believe that would be in this Figure; this 49 right here in Figure 5 designates that worm gear.

Q. Of the patent drawings?

A. Of the patent drawing, yes; Figure 5 of the patent drawing. And this shaft 46 is shown in Figure 5 of the patent drawing. The lever or bar 76 is shown in the cross section right at the pointer here in Figure 4 of the patent drawing. This cam 75, or the sliding or moving cam, is shown in Figure 4 of the patent drawing at this point directly there at the pointer.

The Master: In Figure 4?

A. In Figure 4 of the patent drawing. This 75 runs up to the cam. You see the color of it there, and that represents this same 75 on this drawing here. And the reverse, or I should say the rack bars—I will start here: This shafting 50, shown as 50 here, pointing to the shaft that is a continuous shaft on both sides of the worm housing; that is the same shaft that is shown—well, it is shown under 50. Shall I take this down and show you where it is?

The Master: I know where it is. [363]

A. O. K. That is shown on 50 in the patent drawings. The cross shafts 52 and 53 are shown on the patent drawings. These pinions 54 and 55 are

(Testimony of Henry Noel Dimick.)

shown on the patent drawings. These rack bars 56 are shown on the patent drawings. This lever extending rearward here from the lever 70 is a similar lever shown in the patent drawings and I am quite confident referred to as 64 in the patent drawings; and this bell crank, or a bell crank is shown.

Q. (By Mr. Geisler) What number?

A. 66, is shown in the patent drawing. The bar 67, 67 here on Exhibit 6 and 67 on Figure 3 of the patent drawings.

The Master: May I ask a question there? On exhibit 6 does 67 perform any function, or is that function now taken up by 90 and 91 on Exhibit 6?

A. No, it wouldn't be replaced by these. It wouldn't be replaced by those. It is an upper load stop. It acts only when the carrier is carrying load.

The Master: What is 90 on Exhibit 6?

A. Well, it is an engaging member. It is pivoted on a bracket back alongside of this worm housing, and it is merely placed there to engage the end of this bell crank 66. In other words, when 91 would travel upward and engage 90, 90 would engage this arm of the bell crank 66 and move this lever in this direction and at this end through the connecting links and pivoting at 63, and in this particular instance would, provided this lever were in the——

The Master: Lever 70?

A. Lever 70, were in the lifting position, which is at the notch 71, that action would throw this lever

(Testimony of Henry Noel Dimick.)

back to the central position, as shown here, or neutral position, and when that occurred that would disengage the clutch and apply the brake.

The Master: Well, if 90, when it makes an upward movement, strikes 91, engaging with the bell crank, then thereby shifting [364] the lever 70 in neutral, what function does 67 play?

A. Perhaps I can best explain that. This mechanism here is provided in order to protect the lifting mechanism, provided the driver didn't have a load in the carrier or had a load that wasn't of sufficient height to come up and strike this lever sixty—bar 67 before the racks had reached the limit of their travel, which would be determined by the number of teeth on the rack.

The Master: May I ask another question there, Mr. Dimick? Is the relation of 90 to the rack such that when the load is on, a full load, the top of the load would engage 67 before 90 engages 91?

A. A full load would engage 67 before 91 would engage 90. That is the way you meant to put it, wasn't it?

The Master: Yes. I can't see quite that far.

A. That is correct.

The Master: Yes; 91 would engage 90.

Q. (By Mr. Geisler) In other words, the way I understand it, there are two independent devices which control the upward movement; I mean the rack bars 56?

(Testimony of Henry Noel Dimick.)

A. Yes, that is correct. This drawing shows it that way.

Q. And the Court's question explained the functions? I say, your answer to the Court's question explained their function?

A. Yes, I have explained their function.

Q. Did you make a model illustrating a load lifting and lowering method and controls therefor, as shown by Exhibit 6?

A. I didn't myself. I directed it.

Q. It was made under——

A. It was made under my direction at the Dallas Machine & Locomotive Works, yes, and this model does exist.

Q. Have you examined that model critically and carefully? A. I have.

Q. And state whether or not it is a symbol in all respects the [365] same as the drawing, this perspective drawing, Exhibit 6, in substance, at all events? A. In substance it is, yes.

Q. And shows the operation of the different mechanical devices which are shown by Exhibit 6?

A. Principally it does. There is one thing now speaking of the model, which I don't believe has an exhibit number——

The Master: Exhibit 13 for identification.

Mr. Geisler: To make it clear to the Court I will withdraw some of these charts; so will you take

(Testimony of Henry Noel Dimick.)

some of these away, Mr. Bailiff; all except the middle; leave that there.

Q. Now please explain to the Court how this model operates, and if there are any differences in construction between that and Exhibit 6 point them out.

A. Well, the constructional differences are not very great. The thing that I started out to bring to your attention was the fact that here 47 on this drawing and 47 on the patent drawings of '025, why, we describe a reversible clutch. Due to the model being so small and the necessary frailness of any integral parts of that reversible clutch, we didn't make the clutch reversible in this particular model but at least we must take it for granted in this model that the mechanism designated by the number 74—47, pardon me—is the reversible clutch; and in order to get a reverse action of the shaft 50 we have loosely applied the worm gear, what would be a part of 49 on the drawings, on the shaft 50; and, in other words, it isn't affixed to the shaft 50; so that by moving this upper crank on the front end of shaft 50 in either direction we can get a reverse motion of this shaft 50.

Q. Would that motion illustrate the same action as in Exhibit 6 with regard to the raising and lowering of the load?

A. It would, yes, sir.

Q. And braking mechanism? Proceed with your explanation.

(Testimony of Henry Noel Dimick.)

A. Well, at present the shoes are lowered at the moment and [366] we are prepared to, would be prepared to either raise the shoes empty or take up a load if a carrier similar to this model were in operation. In order to lift the load the driver would put this lever in the position shown——

The Master: Lever 70?

A. Lever 70 in the position shown, or say he were sitting in the center of the machine here he would pull it toward him, which would engage this clutch 47, move the cam 75 from under the brake bar, the corresponding cam under the brake bar 76 at this point, and allow this brake bar to release its pressure on pulley or brake wheel 77; and immediately this action of the clutch, and so on, took place, why, the source of power would be directly connected to the lift through those mechanical movements, which would cause the shaft 50 to rotate in the upward or lifting motion, and as the rack bars 56 raise——now we are kind of pretty close to the point now (illustrating)——there is a contacting member fastened on the inside of this rack here; I don't see it, but that represents the part 91, as shown on the perspective drawing, Exhibit 6.

Mr. Flegel: You can see it there (indicating).

The Master: Right.

The Witness: Now as that comes up and approaches the top of the frame you will note that it engages and this lever 90 is pressed in there; it has

(Testimony of Henry Noel Dimick.)

already engaged; 91 has engaged 90, and this lever is pressed tightly against the lower end of the bell crank 66; well, if that motion continues, which it would in normal operation, that brings the lever to the central or neutral position, which is indicated by 72, the notch 72 on Exhibit 6 and also on the drawings, the patent drawings of '025; and you will note that this bar here is moved over and puts the cam on——

The Master: When you speak of “this bar”, what bar do you mean?

A. Now I will just operate it.

The Master: I have got it but I want to get it in the record. [367]

The Witness: This 48, you see, is disconnected with the lever 70 and so this bar here is connected to bar 48.

Mr. Geisler: When you say “this” always state the numbers, as the Court suggests.

The Witness: I see. The bar——

The Master: 74, according to this?

A. 74, yes. This extension or rod moving out from 48, out to here, would represent the bar 74, and the cam 75 being on the top of this, that movement has placed the cam 75 directly under the cam on lever 76, which has raised this rod or brake bar and applied the brake to——

Mr. Geisler: Which rod or bar is that? Has it a number?

(Testimony of Henry Noel Dimick.)

A. Rod 76, and applied the brake by pulley 77. Now do you want to go through the downward action as well?

Mr. Geisler: You might just as well.

The Witness: All right. Presuming that this mechanism had been raised and reached the upper extreme limit of travel, it would be—all the parts named in connection with the lifting device would be in the position as shown here, or neutral position. Then in order to lower the lifting members or bring about a lowering action in the lifting device, the operator would push this lever away from him or to his right, or to the right of the machine, which I have done here.

Q. In other words, in an opposite direction from that?

A. Yes, in an opposite direction. That has moved—also moving the lever 70 to the lowering position has moved the lever 48 in the same direction and also the bar 74 in that direction, that same direction, and bringing the cam 75 at the contact—make that central contract—with the cam on brake bar 76, allowing brake bar 76 to drop and release contact with the pulley 77. Now all of the members, including the lever 64, bell crank 66, bar 90 and stop 91, are starting, are in position for the lowering movement of the lifting device. All right. Then if we go [368] this way, which would be the rotation of that shaft in lowering position or lowering mo-

(Testimony of Henry Noel Dimick.)

tion, that action continues from the source of power and you will observe as it travels down the set screw designated by 65 on the perspective drawing, Exhibit 6, and on the patent drawings of '025, is coming down directly above the arm of bell crank 66. As that downward motion of the lifting device continues the set screw 65 contacts the bell crank 66 on the outer arm and presses it downward, which action, through connection of bar 64 or lever 64, returns the lever 70 to neutral position, thus disengaging the clutch and applying the brake, as previously described.

Q. When you referred to '025, you had reference to Plaintiff's Exhibit 2, the patent?

A. Yes. But the drawing was out here and I had to just refer to that.

Q. Yes; you just referred to the last three numbers of that patent?

A. Yes, the last three numbers in '025.

Q. Looking at the photograph is the brake operating mechanism which you testified to as shown on the model and in Exhibit No. 6, shown on the photograph also there?

A. On this photograph?

Q. Yes. A. What is the exhibit number?
The Master: 31.

A. Yes, that brake is shown there.

Mr. Geisler: I now offer the model in evidence.

Mr. Fryer: If the Court please, we object to the

offer of the model, Exhibit 13 for identification, on a number of grounds. The principal ground is that it cannot be and is not material to any of the issues raised in this cause. It cannot be material to the issue of alleged commercial success of the device in the patent, because the evidence offered so far shows that it is lacking the mode of operation distinctive of the machine of [369] the patent in suit. It is a machine having parts 90 and 91 which make it a machine which will stop the upward movement of the load lifting means irrespective of the presence of a load in the machine, a fundamental and characteristic difference in operation to that of the machine shown in the drawings of the patent. For that reason it cannot possibly show commercial success, because if this model is to show that machines as shown in the model were made and sold, it merely proves that machines other than machines having a characteristic mode of operation of the patent are made and sold, and that has no bearing on that at all. If the purpose of the model is to explain the construction and operation of the machine of the patent, it is wholly immaterial, and not only immaterial but misleading, because, for the same factors which I have pointed out, it does not show the construction or mode of operation of the patent but, on the contrary, it shows a machine having a distinctly different character as to mode of operation.

The Master: You mean in what regard?

Mr. Fryer: In the fact that the machine in the model is one which will terminate upward movement of the load lifting means irrespective of the presence of a load in the load lifting device. That is something which the machine of the patent cannot do. The machine of the patent is one which will terminate upward movement of the load lifting device solely and only in the event that a load is placed in the machine having the size and shape necessary to engage the bar 67. Lacking a load in the machine having the size and shape necessary to engage the bar 67 the machine of the patent will not terminate upward movement of the load lifting device. In the model, Exhibit 13, on the other hand, as has just been demonstrated to your Honor, upward movement of the load lifting device will be terminated with no load whatsoever in the machine. There is a fundamental characteristic and all-important difference, therefore, in the machine [370] of Exhibit 13 and the machine of the patent in suit, and for that reason, then, the model is not material or relevant to show either commercial success of the machine in the patent or to show and explain the construction or operation of the machine in the patent, or to show any possible similarity between the machine of the patent and the accused device. And on the last point, a further reason why Exhibit 13 is not material or relevant to show any similarity

or identity between the patent and the accused device is the fundamental and well recognized rule that for that purpose the only thing which is material is not any machine which the plaintiff may have built but the machine shown in his patent.

The Master: May I make this inquiry of counsel for the defendants? Other than the fact that the Exhibit 13 for identification contains elements which enable the upward movement of the rack to be stopped when there is no load on it, other than that fact does the model exhibit the principles of the claim 4 of the patent?

The Master: Just to get clear in my own mind, Mr. Fryer, as we go along, if on model 13 there should be placed a load, what you have designated as a full load, is there any question that bar which is marked 67 on that model would stop the upward movement of the carriage?

Mr. Fryer: It would all depend, your Honor, upon the size and formation of that load. If it were as some of the loads which we will demonstrate to your Honor later on in this case, with some boards in one position and others in another, or if it were loads of sacks of cement with spaces between them, the movement of the load upwardly might not operate 67 to cause any result whatsoever and the part 90 and 91 would then [371] function to terminate the upward movement, and that is an operation which is wholly foreign to and impossible in the

operation of the patent in suit. In other words, it gives the machine a completely different principle of operation and our Ninth Circuit Court of Appeals here has often announced that the mode of operation is the thing which counts. For instance, in *Riverside Heights Orange Growers' Association v. Stebler*, 240 Fed. 703, our Circuit Court of Appeals said, "If the device of respondent shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement"—that is identity—"is avoided." So that it is true that Exhibit 13 is substantially the machine of the drawings of the patent in suit except for the addition to that exhibit of the parts 90 and 91, but the mere addition of those small parts makes a complete fundamental change in the mode of operation of the machine.

The Master: Now Mr. Geisler, what is your position with regard to parts 90 and 91? Do you claim that they are disclosed by the patent?

Mr. Geisler: Yes, Your Honor. We do not disclose—limit ourselves to any specific means, but the introduction states, "Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake". Again, before the specifications, I mean the claims, it states: "Any desired form or reversible clutch

may be used and any old or common form of brake for the driving mechanism", and so on. And, "Other details may be varied in their form and location, and in general the invention is intended to be limited only by the scope of the appended claims."

Now in the argument that counsel advanced he didn't give the proper emphasis to what the courts say about substantial identity. Now the only thing there is here, we have brought out by the witness two different modes in which the [372] raising of the load is limited, one by means of putting a load on the carrier, another to assure that it will stop. Now there would be the necessity of course, probably as developed in the manipulation and the running of this carrier, that if the carrier were empty and you applied the load lifting element, why, the thing would go and something might snap, break; so it was a natural expedient. However, the idea is fundamentally the same means for limiting the lifting of load.

Then take the position of the defendants here, your Honor, which we must always bear in mind; a solemn admission of course would have to have some weight. The defendant for the purpose of laying foundation for laches states that the plaintiff neglected to assert any rights under the patent against the defendants' carrier, or others substantially identical therewith.

Mr. Fryer: You didn't read that all.

Mr. Geisler: Substantially identical therewith. Pardon me. Substantially identical. Now does the claim limit anything here? It says I claim load lifting; we have the power; and then we have means for moving the clutch—means for moving the clutch into neutral position upon the movement of the load lifting means to a predetermined extent in either direction. That is the claim. That is what we brought suit on. The device which we alleged in our bill of particulars as being the source of the brake shows identically the thing which is shown by Exhibit 6. The defendant admits that it furnishes that manual to the trade and admits that it is manufacturing a device just as shown in that manual. So there we have a combination of these admissions that the thing which the defendant made is as shown in the service manual, which is part of the exhibit of the bill of particulars. Further, the admission that the service manual shows a device which is substantially identical to the plaintiff's patent, we claim. So, your Honor, I feel as if I am wasting the Court's [373] time by trying to cite any further authorities, because it is an elementary rule, as far as that is concerned.

Mr. Fryer: May I answer one question?

The Master: Yes, Mr. Fryer, of course.

Mr. Fryer: I believe most of the remarks of Mr. Geisler do not answer the inquiry which you ad-

dressed to him. There is only one statement made by him which I can discern as having any bearing on that question. He was asked to point out whether or not the patent showed parts 90 and 91, and he quoted a portion of the specifications which he relied on as being a disclosure of that part. Now that portion of the specification is statement of the object of the invention. Of course the statement of the object of the invention is merely the expression of a hope, but not a disclosure of any construction. He did not point to any portion of the description showing parts 90 and 91, and we have the patentee's own statement that no parts 90 and 91 are found in the patent.

The Master: What it comes down to, Mr. Fryer, is this: whether or not 90 or 91 are mechanical equivalents?

Mr. Fryer: No.

The Master: It doesn't come to that?

Mr. Fryer: No. It is much deeper than that. It is the question of the fundamental mode of operation of the machine as a whole. Irrespective of the language of the claims, it is the mode of operation that counts. It is true in this patent the patentee has obtained a patent with language broad enough to include a machine known as a carrier and every one that has ever been built, our proofs will show. He has been granted a claim much broader than his contribution to the art. So that he comes directly, as

these authorities will show, where plaintiff attempts to show an infringement by trying to literally read his claims on the defendant's structure he does not use the proper test, even though the plaintiff could bring the defendant within the letter of the claims, if there is a difference in the mode of [374] operation. Now 90 and 91 cannot do anything in the disclosure of the patent in suit, because the whole theory of the disclosure of the patent in suit is that the machine will not work to stop the upward movement of the load lifting means unless you have a certain kind of a load, a certain height, certain length, and so forth, in the machine. That fundamental mode of operation being different, it is not a matter of equivalency between 90 and 91 and anything shown in the patent.

The Master: Well, I will admit this exhibit, not however holding that the questions raised by counsel for the defendants as to the relatively different means of operation existing—making no holding upon that but reserving that question for further consideration. And so far as 90 and 91 are embodied in this Exhibit 13, I will place upon the plaintiff the burden of showing that those are within the language of the disclosures of the patent; not the burden of proof, but I mean for my own satisfaction.

(The model heretofore marked for identification as Complainant's Exhibit 13 was thereupon received in evidence.)

Mr. Fryer: Did you wish to ask a question?

The Master: Yes, I did. This question need not be answered by either party if it will interfere with their conduct of the defense or the prosecution of this action, but I just want to see whether I understand the position of the defendants.

Mr. Fryer: I will try to answer you in a way to help Your Honor, in any way I can.

The Master: Am I right in stating that your position is that a device for stopping the upward movement of the rack which is not accomplished by means of the load engaging either with bar 67 or a mechanical equivalent is such a different [375] method of operation as not to come within the disclosure of the patent?

Mr. Fryer: I could perhaps state it this way—I doubt that I can answer that “yes” or “no”—the machine of the patent, as I understand it, and as we hope to prove, has no mechanism whatsoever which will stop upward movement of the load-lifting means in a number of cases, the first of which is if there is no load in the machine. If there is no load in the machine, the machine of the patent will never stop upward movement of the load-lifting means, and mis-operation will result, and the machine will be destroyed, unless we have this safety device which has been excluded from the case. A similar result will happen to the machine of the patent if the load placed in the load-lifting means

is not high enough to strike 67 in time to prevent the rack bars from reaching the end of the teeth on those bars. In that event, you will wreck the machine before you will stop upward movement of the load-lifting means. So that the machine of the patent, as our evidence will show, is such that unless you have exactly the right size load, with exactly the right shape, so that at the proper time it will strake bar 67, the machine of the patent will be destroyed, unless this safety device, which is not involved in this suit, happens to work. Now, the minute you add to the machine of the patent parts which give the machine of the patent a wholly different mode of operation, that is, parts like 90 and 91, which will operate merely by upward movement of the rack bars, irrespective of any load in the machine, the conditions of operation which I have mentioned do not occur. With those parts added, the load-lifting means will stop as soon as the rack bars have moved the predetermined distance, and that by virtue of contact between 90 and 91, and that contact, as is evidenced, will occur no matter what size or shape of load is in the machine or whether there is no load in the machine. So that our position is that 90 and 91 are parts foreign to the [376] whole teaching of the patent in suit, they are parts which operate in direct antithesis to the theory of operation of the machine of the patent in suit. In other words, the patent in suit is a load con-

(Testimony of Henry Noel Dimick.)

trolled stop machine, and a machine like Exhibit 13 is a lift controlled where the stop is controlled solely by the lift. The machine of the patent in suit has a stop which is not controlled by the lift in any way, but on the contrary is controlled entirely by the presence and character of the load in the machine.

I don't know if I have made myself clear, but that is our position. Does that answer your question?

The Master: I think that answers the question as to what your position is.

Mr. Fryer: Yes.

The Master: All right, you may continue with your direct examination.

Q. (By Mr. Geisler) Mr. Dimick, you may state why on that drawing, Complainant's Exhibit 6, you included the devices 90 and 91 in addition to 67?

A. When this lifting device was set up at the Dallas Machine & Locomotive Works, I was instructed to make a drawing showing the parts as they were on that lifting device, so I proceeded to do that; I followed out the lifting device as much as possible on a drawing of that sort in exact detail, and that made it necessary for me to include the bar 90 shown on the Exhibit 6 and the lug or engaging member on the rack as shown on that Exhibit 6. Then after having done that, made the drawing, had it all completed, it was necessary and I was instructed to put reference numbers on this

(Testimony of Henry Noel Dimick.)

drawing, and in order to do that correctly I then took the copy of the patent and I read through the patent, the various numbers, and noted them in a way which I believe is correct according to my reading of the patent, of the correct number of the various parts of the mechanism. Then when I had completed the reading of the patent as far as reference numbers [377] were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in the patent as a means of stopping the lifting mechanism when the—or, in other words, it should be disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction, and my interpretation of this action was that the members 90 and 91 were members supplied to terminate the movement of the load-lifting means to a predetermined extent in the upward direction, and without any instructions whatever I noted those two numbers, which do not appear in the patent description, on the drawing, so that I was able to write description of this particular Exhibit 6 in completeness.

Q. During the time you were employed at the plaintiff's plant, did they commence to manufacture hydraulic lifts?

A. My recollection of the exact happenings were that I went to work for the plaintiff just about the

(Testimony of Henry Noel Dimick.)

time that the first hydraulic lift was completed, and assisted in the construction of the second hydraulic lift carrier, and helped finish up the first one.

Q. Did you know the purpose of making hydraulic lifts?

A. Well, my understanding has been as an employe of the plaintiff that it was his idea that a hydraulic hoist or lift was considered one of the best means of lifting loads or raising heavy obstacles, a hydraulic lift or a jack or something similar that operated hydraulically was a very good means, at least, of lifting a load.

Q. What advantage did the hydraulic have, if any?

A. Well, the advantages were cited that there was not as much complicated mechanism, being principally cylinders and piping, and did not require a reversible clutch to operate this hydraulic lift, to furnish the pressure necessary to operate the hydraulic lift, and a positive means of controlling the flow of liquid, as well as an automatic means of stopping the flow of liquid by stopping the pump when a certain pressure had been established in [378] the hydraulic mechanism, and by those devices, or by that operation, rather, the flow of liquid and creation of the pressure to disengage the clutch, it was unnecessary then to have brakes or other automatic stops than a governor to stop the load-lifting means when it had traveled to the upper

(Testimony of Henry Noel Dimick.)

extent or the lower extent, and it was unnecessary to have a brake that would hold the load in any particular position, due to the fact that an operating valve installed integral with the piping of this hydraulic machine would stop the flow of liquid in either direction and hold the load in the desired position.

Q. Were you still employed at the plaintiff's at the time the manufacture of hydraulic lifts was discontinued?

A. Well, I may have to make a rather broad statement. I was employed by the plaintiff at the time that he decided to discontinue—or, not discontinue, but to manufacture a carrier other than a hydraulic lift, and he and I talked about it at various times——

Q. Who is he?

A. The plaintiff, Mr. Carl Gerlinger.

Q. The patentee?

A. Yes—and the last hydraulic carrier that I have any recollection of the Dallas Machine & Locomotive Works Building, or the last one that I helped construct or had anything to do with, was a machine that went to Australia, and in connection with the Dallas Machine & Locomotive Works and their agents in Australia I went to Australia with this machine, and just previous to my departure to Australia, why, I did some work on the first rack and pinion model carrier, or what is termed the

(Testimony of Henry Noel Dimick.)

RPF, but at the time I left for Australia, that machine was not completed. Some of the members were installed on the frame, and so on, but before I left I was familiar with what the machine was going to be——

Q. What do you have reference to, what that machine was going to be? What kind of a machine?
[379]

A. It was a rack and pinion Gerlinger carrier, rack and pinion lift similar in operation to the one shown here on Exhibit 6. Upon my arrival in Australia the machine was—the hydraulic machine was late in arriving—in other words, it arrived after I did—and I set the machine up there and put it in operation, and some time later I was employed as an engineer in Australia by Gunderson-Northworth, Proprietor, Ltd., which later became the Timber Transport & Storage Company, Proprietor, Ltd. I ordered through my employers—I have stated who they were——

Q. A little louder, so the Court may hear.

A. I ordered through my employers in Australia four of the new rack and pinion carriers known as the RPF model, and when they arrived, why, we put them in operation at the Timber Transport & Storage Company plant. So that this machine which I took to Australia, or which was the reason for my going to Australia, a hydraulic machine, was the

(Testimony of Henry Noel Dimick.)

last of the ones I actually had any experience with at the Dallas Machine & Locomotive Works.

Q. The last hydraulic?

A. Yes, the last hydraulic,—and the four rack and pinion machines, RPF model, which I ordered from the Dallas Machine & Locomotive Works, to be delivered in Australia, were my first view of the completed RPF model.

Q. Do you know why the hydraulic lumber carriers, hydraulic-lift lumber carriers, were discarded?

A. Well, the principal reason for that was that piping, regardless of whether it was steel or copper or some of the other types or materials, which are used for conducting or carrying fluid put through the hydraulic lift, were subject to leaks and would leak oil out on the frame and other parts of the machine, it would drip on lumber and damage lumber, and we found in some in- [380] stances, speaking of the Dallas Machine & Locomotive Works as a whole—that is, the people who were operating the machines and building them—found that in many instances drivers of carriers were incompetent in a mechanical way to keep this hydraulic lift operating satisfactorily, and one of the reasons was that they would let leaks accumulate and get worse, and I myself, at various times during the period while the Dallas Machine & Locomotive Works were

(Testimony of Henry Noel Dimick.)

manufacturing carriers with a hydraulic lift, tried to influence Mr. Gerlinger——

Mr. Fryer: Now, if your Honor please, I think that we have gone pretty far afield with this long dissertation about various things. I have been trying to see what materiality or relevancy it may have. Unless Your Honor particularly cares to hear this evidence we will object to it on the ground that it is wholly immaterial and irrelevant and no part of the plaintiff's opening case on any of the issues framed in the pleadings.

The Master: What do you claim for it?

Mr. Geisler: Well, Your Honor, they claim that because for a time hydraulic lifts were manufactured that we abandoned our invention.

The Master: Aren't you rather anticipating their defense?

Mr. Geisler: Well, they so charge right here.

The Master: I know, but aren't you anticipating their defense?

Mr. Geisler: That is true, but the points were made when cross examination came up——

The Master: If you want to anticipate the defense I shan't bar you from it.

Mr. Geisler: No. Very well, then I just want to explain through this witness why those hydraulic lifts were discontinued.

Mr. Fryer: All right, withdraw our objection, Your Honor.

(Testimony of Henry Noel Dimick.)

Mr. Geisler: The witness is yours.

Mr. Fryer: Have you concluded your examination? [381]

Mr. Geisler: Yes, sir.

The Master: Well, he didn't finish his answer—he said, “I myself at various times during the period while we were manufacturing hydraulic machines tried to influence Mr. Gerlinger”, and then there was an interruption. Influenced to do what?

A. I tried to influence him to——

Mr. Geisler: I will withdraw the question.

Mr. Fryer: May I have just a moment, if Your Honor please?

The Master: Yes, sir.

Mr. Fryer: Oh, that is right, the cross examination of this witness is to be deferred until we complete the cross examination of the witness Gerlinger.

The Master: That is the understanding. Anything further of this witness?

Mr. Geisler: No, Your Honor.

The Master: You will be excused temporarily. You will be back, however, tomorrow, because your cross examination will take place tomorrow, Mr. Dimick.

A. Thank you, Your Honor.

(Witness excused.)

The Master: Will you call another witness.

Mr. Geisler: Mr. Ballantyne, take the stand, please.

WALTER E. BALLANTYNE

was thereupon produced as a witness in behalf of the complainant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. Walter E. Ballantyne, Dallas, Oregon.

Q. (By Mr. Geisler) What is your position with the plaintiff corporation? [382]

A. Secretary-treasurer.

Q. When was the corporation organized?

A. December 1st, 1919.

Q. Have you been holding tht same position ever since? A. I have.

Q. Did you keep any shop records there?

A. I did.

Q. Did you keep records with regard to the work done on these carriers that have been testified to? A. I did.

Q. Now, by looking at your records, if you wish to refresh your memory that way, you may state when the first work was started on lumber carrier which is Plaintiff's Exhibit No. 1, identified by the last three numbers of the patent as 958?

A. Started in May, 1921.

Q. Do you know when that lumber carrier was taken over to a shop to be tested out?

A. Well, it was taken over about the latter part of July.

(Testimony of Walter E. Ballantyne.)

Q. What year? A. 1921.

Q. Where?

A. At the Willamette Valley Lumber Company in Dallas is where it was tested out.

Q. Do you know personally what happened with respect to that lumber carrier? A. I do.

Q. Will you state what occurred?

A. Well, we didn't find it very satisfactory. We had to bring it back and put on a new power plant and a gear——

The Master: Speak up so I can hear. You had to bring it back?

A. We had to bring it back and put on a new power plant and change the gear drive to a chain drive, and there were some changes made then in the lifting mechanism. [383]

Q. (By Mr. Geisler) Was anything else observed with regard to the workings of that number 1 machine? A. Not——

Q. I mean the original machine?

A. No, not on the original that I know of.

Q. I am referring now to the machine made like patent number 958. A. Well,——

Mr. Fryer: We object to that, if Your Honor please, on the ground that there is utterly no foundation laid; that that exacts an opinion from this witness, not shown to have had any knowledge or means of knowledge of the facts inquired about.

Mr. Geisler: The witness was right there. It

(Testimony of Walter E. Ballantyne.)

has been testified, and he has been here, talked about so much, that the first machine was taken back, that is to say, a machine made like the first patent,—the original patent, I will say, the last three numbers of which are 958, was taken back to the shop and made over. That is what Mr. Gerlinger testified. I am asking this witness whether he—he says he was there—if he knows anything about it.

Mr. Fryer: Nothing has been brought out to show that this witness has any knowledge of construction of machines or knowledge of the contents of any of the patents in evidence, Your Honor, and that is one of the grounds of my objection, lack of foundation.

The Master: Well, I think the objection is well taken upon the proposition that this witness has not yet been shown to have had any knowledge of Patent 1422958.

Q. (By Mr. Geisler) Well, are you familiar with the construction of that patent just referred to? A. I am.

Q. Have you during the number of years that you have been employed there by the plaintiff acquired any knowledge of machinery?

A. I have. [384]

Q. Did your duties require the examination of drawings and machine sketches, and so on?

A. Well, part of my work was along that line. I had to order all the material for the carriers, and

(Testimony of Walter E. Ballantyne.)

quite a bit of this material I had to draw my order from the blueprints even, and I had to be familiar with blueprints—while I am not a mechanical engineer, or anything that way, but I have a fair knowledge of blueprints, drawings.

Q. You have studied this patent, Plaintiff's No. 1, Exhibit No. 1, 1422958? A. I did.

Q. And are familiar with this construction?

A. Yes.

Q. You may state further if the machine which was built sometime prior to July, I believe, 1921, was or was not like this Plaintiff's Exhibit No. 1?

A. It was. Now, Plaintiff's Exhibit No. 1,—I would like to know what you mean by that.

Q. Plaintiff's Exhibit No. 1 is 1422958.

A. Yes.

Q. Now, what was done with that machine after it was built in the shop?

A. It was taken over to Willamette Valley Lumber Company, where they tried it out. As I stated before, it was not very satisfactory and they brought it back.

Q. Do you know why they brought it back?

A. Well, the power plant was not very satisfactory, and the gear drive was not satisfactory, and needed some improvements in the lifting mechanism.

Q. Do you know of your own knowledge what the improvements were that were made in the lifting mechanism?

(Testimony of Walter E. Ballantyne.)

A. Well, the only change that I know of, they changed some of the levers around. On account of the different construction of [385] the new power plant, that had to be changed somewhat. And then they found out they would need a brake on it.

Q. What was done with that machine when it was brought back from the Willamette Valley Lumber Company to the plaintiff's shop?

A. It was reconstructed, rebuilt.

Q. When was that rebuilding done?

A. Well, started right after they brought it back, and it was completed the latter part of September.

Q. What then was done with that machine?

A. It was sold to Willamette Valley Lumber Company at Dallas, Oregon.

Q. Was it operated then by the Lumber Company? A. It was.

Q. Are you familiar with the plaintiff's Exhibit 2, which identifies the plaintiff's patent 1457025? A. I am.

Q. You have studied that patent?

A. I have.

Q. And you feel you know its mechanical details? A. Pretty fair, I think.

Q. Now, you may state whether that machine that was taken to the Willamette Valley Lumber Company's yard about October 1st, 1921, was or was not like this patent Plaintiff's Exhibit 2?

(Testimony of Walter E. Ballantyne.)

A. It was, substantially identical.

Q. State whether or not to your knowledge any further machines were afterwards built—that is to say, subsequent to October 1st, 1921—in the shop of the plaintiff similar to patent Plaintiff's Exhibit 2?

A. There were.

Q. When were those machines built?

A. The next one—or the first charges I have according to the records were October 4th, 1921.

Q. What shop number did you assign to that, or was it known by, in other words? [386]

A. Well, my records show it as G-10, but on the—the Court so far has been calling that machine number 2.

Q. Do you know anything about machine number three? A. Yes.

Q. How was that built? A. Just the same.

Q. Was there a machine number four built?

A. There was.

Q. When was that machine built?

A. Well, it was—machines numbers two and three were finished in February first, and then this other one, machine number four, was completed and delivered on April 1st, 1922.

Q. Was that machine the same or different from numbers two and three—number four?

A. It was the same.

Q. You may look at this photograph and state if you recognize—it is some place here, I haven't

(Testimony of Walter E. Ballantyne.)

got the number, your Honor. That is the picture with the men in it, the group of men.

The Master: I think it is numbered on the back, isn't it?

The Bailiff: I think you have got it there.

The Master: Twenty-nine.

Mr. Geisler: Twenty-nine?

The Master: Yes.

Q. (By Mr. Geisler): The bailiff will kindly show that to the witness that the Court has. I would like the other returned to me. Were you present at the taking of that photograph? A. I was.

Q. Do you identify some of the people that were there? A. I do.

Q. For example, looking at the righthand side, whom do you see there?

A. The righthand side, the first one is Carl F. Gerlinger, the patentee.

Q. A little louder. [387]

A. The first one to the right is Carl F. Gerlinger.

Q. Who is the next? A. That is myself.

Q. Looking at the left, who is the man standing with his elbows akimbo? A. Nels Anderson.

Q. When was this photograph taken?

A. Well, I can't fix the exact date, but just shortly prior to February 1st, 1922.

Q. Where?

A. It was taken in front of the plant of the Dallas Machine & Locomotive Works, Dallas, Oregon.

(Testimony of Walter E. Ballantyne.)

Q. What machines, referring to what was testified here to as numbers two and three, and so on—what particular machines does that photograph show?

A. It shows machines two and three.

Q. To whom were those machines two and three delivered?

A. To Cobbs & Mitchell Company. They were delivered at Independence and shipped up by rail.

Q. To what place? A. To Valsetz.

Q. Oregon? A. Yes, to Valsetz, Oregon.

Q. Now, I would also like you to identify these two machines— This is 29. Exhibit 30?

The Master: I assume that is it.

Q. State whether or not those are the same—include the same machine—one of them is the same machine—no, it is the same two machines as shown in Exhibit 29, in the photograph I hand you?

A. They are, yes.

Q. Do you know of your own knowledge when the plaintiff discontinued—or when the plaintiff commenced to manufacture hydraulic lifts?

A. I do. I kept the records. [388]

Mr. Geisler: Read that question back, please.

(The question was thereupon read.)

Q. (By Mr. Geisler): The question should be, began to manufacture hydraulic lifts. Do you know that? A. Yes, sir.

Q. Do you know when the plaintiff discontinued manufacturing hydraulic lifts? A. Yes.

(Testimony of Walter E. Ballantyne.)

Q. After that what kind of a lift did the plaintiff manufacture?

A. Rack and pinion lift, called the RPF.

Q. How many of those did you manufacture after you again commenced to manufacture mechanical lifts?

A. You mean after we quit the hydraulic?

Q. Yes. A. Ninety-five.

Q. How do you know that?

A. I have got the records. Do you want to see them?

Q. No, unless counsel wishes to see them. Have you a record charge with regard to the first work on carrier number 2 that we have been speaking about here?

A. I have.

Q. When was that charge? A. What——

Q. On your records when was the first charge for labor, or whatever it might have been?

A. October 4, 1921.

The Master: He already testified to that.

Mr. Geisler: Yes, I think he has. I wasn't sure. To whom was the carrier number 4 sold?

A. To the Brighton Mills Company at Brighton Oregon.

Q. Can you tell us the cost of these lumber carriers?

A. Do you mean the cost or the——

Q. The price at which you sell them.

A. The present carriers, do you mean, that we are manufacturing now? [389]

Q. Yes, with the mechanical lift?

(Testimony of Walter E. Ballantyne.)

A. They range from \$3,850 for the light models up as high as \$7,050 for the larger six-wheeled model.

The Master: Thirty-eight fifty to seven thousand fifty? A. Yes, sir.

Q. (By Mr. Geisler): Have you any knowledge as to when the plaintiff first became aware that the defendant was manufacturing lumber carriers—

A. I have.

Q. —which are infringed upon, we claim infringed upon, by the defendant's hoists?

A. I have.

Mr. Fryer: We object to that as grossly incompetent. Certainly this witness is not competent to pass upon the legal question of infringement of a patent or express opinions upon it. That is for the Court to pass upon.

The Master: The question was whether he knew when the patentee first became aware of a patent infringement.

Mr. Fryer: It assumes that fact, also.

The Master: It assumes the infringement, but I assume what counsel has in mind, the alleged infringement.

Mr. Geisler: The claimed infringement.

Mr. Fryer: It is improper in form for that reason.

The Master: Well, let's let it show that it is modified by the insertion of the word "claimed infringement".

(Testimony of Walter E. Ballantyne.)

A. May I have the question again, please?

The Reporter: (Reading) "Have you any knowledge of when the plaintiff first became aware that the defendant was manufacturing lumber carriers which are infringed upon, we claim infringed upon, by the defendant's hoists?"

Mr. Geisler: Which the plaintiffs claim were infringed upon.

A. In September, 1935.

The Master: It has now reached the hour of five o'clock, gentlemen. We will adjourn until ten o'clock tomorrow morning. [390]

(Whereupon, at 5:00 o'clock P. M., November 24, 1936, the hearing in the above entitled cause was adjourned until 10:00 o'clock A M., November 25, 1936. [391])

WALTER E. BALLANTYNE

thereupon resumed the witness stand, and was examined and testified further as follows:

Direct Examination

By Mr. Geisler:

Mr. Geisler: Will the reporter please read the last question which was put to Mr. Ballantyne?

(The question referred to was thereupon read.)

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: I will ask that the question be made more definite by referring specifically to the defendant Willamette-Hyster Company.

(The answer to the question just read was then read.)

Q. (By Mr. Geisler) What was the occasion of your attention being drawn to the lumber carrier manufactured by the Willamette-Hyster at that time?

A. Why, the Dallas Machine & Locomotive Works received a requisition from the Shevlin-Hixon Company. This requisition was dated about September 3rd, 1935,—

A. —and this was for two Gerlinger carriers equipped with swinging shoes; and about a week later we received a letter, dated September 11th, and in this letter they asked the Dallas Machine & Locomotive Works to guarantee Shevlin-Hixon against any suit for infringement of any patented device or unpatented, and at the same time that we got the order we understood that Willamette-Hyster had got an order for two machines also.

Q. From the same company?

A. From the Shevlin-Hixon Company; and we had previously sold them a number of carriers and other equipment and had never had this request for a guaranty before and it made us rather suspicious, so we started investigating to see if the design of our swinging shoe could possibly infringe on the patents that the Willamette-Hyster had on their

(Testimony of Walter E. Ballantyne.)

swinging shoes, and in this investigation we sent for copies of the Willamette-Hyster patent, and also had our General Superintendent go out and [392] make an examination and inspection of several of their machines, and during the course of this investigation, why, we found out the similarity of the machines.

Q. Whose machines?

A. Of the Willamette-Hyster and the Gerlinger patent in question. Then we took it up with our attorney to see if in his judgment there was an infringement.

Q. And that was the first intimation of any infringement that you had? A. Yes.

Mr. Fryer: We object to leading the witness, your Honor.

Mr. Geisler: He already said so, at the first——

Mr. Fryer: It is objected to, also, on the ground that it is merely repetition, that it is plainly putting words in the mouth of the witness.

The Master: The question is leading.

Q. (By Mr. Geisler) Had you any other intimation of infringement on the part of the defendant Willamette-Hyster before then?

A. We did not.

Q. Now, with regard to the defendant Clark & Wilson Lumber Company, when did you first learn of their having any machine that you believe was an infringement upon the plaintiff's patent?

A. Well, it was about the same time. After we decided on this other, why, we knew that Clark

(Testimony of Walter E. Ballantyne.)

& Wilson had purchased several carriers from the Willamette-Hyster.

Q. What investigation then did you make further?

A. Our General Superintendent inspected the machines at the Clark & Wilson Company.

Q. And what did you find?

A. Found they were the same as the other machines they had investigated and in their judgment were thought an infringement.

Q. Now, state whether or not at any time previous to then you had any intimation or knowledge of infringement or use of any machine of plaintiff's patent by the Clark & Wilson Lumber Company? A. We did not. [393]

Q. State whether or not there was any marking of the lumber carriers put out by the plaintiff?

A. There was. They had patent plates on them.

Q. What did the patent plates state?

A. Well, they stated the patent number, as soon as we had a patent number, as soon as we received our first patent. Previously they had "Patents Pending" or "Patent Applied For"; I wouldn't say now for sure which.

Q. You may state whether or not prior to—or outside of the defendant Willamette-Hyster Company here your patent rights of the patent here in suit have ever been questioned by anybody?

Mr. Fryer: Objected to on the ground of total lack of foundation, this witness not having been

(Testimony of Walter E. Ballantyne.)

shown to have the means or knowledge necessary to answer that question.

Mr. Geisler: He is the Secretary, Your Honor, and a corporation can only find, of course, things through its officers.

Mr. Fryer: But it has not been shown that he knows what is going on through all the four corners of the United States.

Mr. Geisler: Well, I am just asking him whether or not he knows of that.

The Master: If you ask it in that form the question may be answered.

A. We didn't know of any.

Mr. Geisler: You may cross examine.

Mr. Fryer: Cross examination is reserved until after the completion of the cross examination of the witnesses Gerlinger and Dimick.

The Master: Call your next witness.

(Witness excused)